Winter 1983

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Recommended Citation

Gary S. Gildin, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 *Hofstra L. Rev.* 557 (1983).

HOFSTRA LAW REVIEW

Volume 11, No. 2 Winter 1983

THE STANDARD OF CULPABILITY IN SECTION 1983 AND *BIVENS* ACTIONS: THE PRIMA FACIE CASE, QUALIFIED IMMUNITY AND THE CONSTITUTION

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I. INTRODUCTION

Two of the principally utilized, though by no means exclusive,[1]

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1. Other statutes that afford redress for unconstitutional conduct include 18 U.S.C. § 241 (1976) (criminal action for conspiracy to interfere with constitutional rights); 18 U.S.C. § 242 (1976) (criminal action for willful deprivation of constitutional rights under color of law); 18 U.S.C. §§ 2510-2520 (1976 & Supp. III 1979) (civil and criminal actions for improper interception, use or disclosure of wire or oral communications); 42 U.S.C. § 1981 (1976) (civil action for interference with equal rights under law); 42 U.S.C. § 1982 (1976) (civil action for interference with property rights of citizens); 42 U.S.C. § 1985 (Supp. IV 1980) (civil action for conspiracy to interfere with civil rights); 42 U.S.C. § 1986 (1976) (civil action for failure to prevent conspiracy to interfere with civil rights); 42 U.S.C. §§ 1997-1997j (Supp. IV 1980) (civil action for equitable relief for "egregious or flagrant conditions" depriving institutionalized persons of constitutional rights "pursuant to a pattern or practice of resistance to the full enjoyment of such rights," *id.* § 1997a(a)); 50 U.S.C. §§ 1801-1811 (1981) (civil and criminal actions for improper electronic surveillance).

Conduct that contravenes federal constitutional rights may also violate state law, giving rise to a cause of action under state tort law or the Federal Tort Claims Act, ch. 753, tit. IV, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.). Furthermore, state constitutional law may extend greater protection to individual rights than the federal constitution. *See* Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Linde, *First*

sources of action to redress deprivations of federal constitutional rights are 42 U.S.C. § 1983[2] and the constitutional cause of action recognized by the United States Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[3] ("*Bivens* actions"). The Supreme Court and lower federal courts have attempted repeatedly to determine the standard of culpability, or fault, necessary to establish liability under these two actions.[4] Nonetheless, the issue remains far from settled.

Most courts have failed to realize that a culpability requirement in section 1983 and *Bivens* actions could issue from one or more of three distinct sources. First, the plaintiff may have to prove that the defendant acted negligently, recklessly or intentionally to establish the particular constitutional violation for which relief is sought. In such instances, it is the United States Constitution that imposes a culpability requirement.[5] Second, even where the plaintiff need not show culpability to establish a constitutional deprivation, section 1983 or *Bivens* could, nevertheless, require the plaintiff to prove that the defendant acted with a certain degree of fault as an element of

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Things First: Rediscovering the States' Bill of Rights, 9 U. BALT. L. REV. 379, 389-91 (1980).

2. 42 U.S.C. § 1983 (Supp. IV 1980) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. 403 U.S. 388 (1971). In *Bivens*, a claim for damages arising out of a search conducted by agents of the Federal Bureau of Narcotics in violation of the fourth amendment, the United States Supreme Court implied a private right of action against government officials who violate the fourth amendment under color of federal law. *See infra* notes 296-308 and accompanying text. The rationale of *Bivens* has been extended by the Court to allow private damage actions arising out of violations of other constitutional provisions. *See infra* notes 310-14 and accompanying text.

4. This issue frequently is phrased in terms of the state of mind necessary to subject a defendant to liability. *See* Parratt v. Taylor, 451 U.S. 527, 534-35 (1981); Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. CIN. L. REV. 45 (1977); Comment, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870 (1973). However, because an analysis of accountability under § 1983 and under *Bivens* must also consider whether liability is to be imposed for negligent conduct, *see Parratt*, 451 U.S. at 534-35, which addresses the reasonableness of the defendant's actions rather than his state of mind, the term "culpability" is more appropriate.

5. *See infra* notes 255-92, 392-95 and accompanying text.

the prima facie statutory or implied constitutional cause of action.[6] A third potential source of a fault requirement is the qualified immunity defense, which allows a defendant to avoid liability when his actions, albeit unconstitutional, are not blameworthy.[7]

A proper analysis of the standard of fault in suits brought under section 1983 and *Bivens* must consider all three possible origins of a culpability requirement for several important reasons. First, all three potential sources of culpability will not be present in every case. While some constitutional provisions are violated only where the defendant acts intentionally or recklessly, the plaintiff may not be required to show even negligence to establish a deprivation of other constitutional rights.[8] Similarly, the qualified immunity defense may be unavailable,[9] or it may be waived by the defendant's failure to plead the immunity as an affirmative defense.[10] As a result, it is not possible to identify a single standard of culpability applicable to every section 1983 or *Bivens* action.

Second, the origin of the fault requirement will determine which party bears the burden of proving culpability in a particular case. The burden of proving any culpability necessary to establish a constitutional deprivation and a prima facie claim under section 1983 or *Bivens* rests with the plaintiff.[11] An overwhelming majority of the federal courts, however, have held that it is the defendant who carries the burden of proving the qualified immunity defense.[12]

Finally, it is essential that the three sources mesh to create a standard of culpability which the trier of fact can understand and apply logically. For example, if the plaintiff must prove that the defendant acted negligently to establish a constitutional violation and/or a prima facie claim for relief, then the defendant should not be

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6. *See infra* notes 60-119, 340-47 and accompanying text.

7. *See infra* notes 120-254, 348-91 and accompanying text.

8. *See infra* notes 255-92 and accompanying text.

9. Municipalities possess no immunity from liability under § 1983. *See* Owen v. City of Independence, 445 U.S. 622 (1980). *But see* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (municipalities are immune from liability for *punitive* damages in § 1983 actions). Private individuals who conspire with state actors to violate constitutional rights similarly have no immunity from § 1983 liability. *See* Dennis v. Sparks, 449 U.S. 24 (1980). The qualified immunity also has been generally held unavailable in actions seeking equitable relief. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975); Rowley v. McMillan, 502 F.2d 1326, 1332 (4th Cir. 1974).

10. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Boyd v. Carroll, 624 F.2d 730 (5th Cir. 1980).

11. *See infra* notes 109-19, 263-374 and accompanying text.

12. *See infra* notes 203-27, 387 and accompanying text.

able to avoid liability through the qualified immunity by proving the reasonableness of his actions. Assigning both parties the burden of proof on precisely the same issue is, at best, unnecessarily confusing to the trier of fact and, at worst, impossible to apply; yet, remarkably, this is the result that many courts have deliberately or unwittingly achieved.[13]

The thesis of this article is that the correct interrelationship of the three sources of culpability in section 1983 and *Bivens* constitutional tort actions is as follows: (1) The plaintiff in such actions must prove only two elements to state a claim for relief: (a) that he has been deprived of a constitutional right, and (b) that the deprivation was caused by a person acting under color of law. Except where necessary to establish a constitutional violation, the plaintiff is not required to prove any culpability to prevail; (2) the qualified immunity allows a defendant to avoid liability by proving freedom from culpability; specifically, he must show that he did not act negligently. In section 1983 actions, the defendant also must prove that he did not intend to injure the plaintiff; and (3) the plaintiff may be required to prove that the defendant acted negligently, recklessly or intentionally to establish a particular constitutional violation. In such cases, the defendant cannot escape liability through the use of the qualified immunity. By proving the constitutional violation, the plaintiff will have negated the qualified immunity.

II. THE STANDARD OF CULPABILITY IN SECTION 1983 ACTIONS

A. *The Background and Scope of Section 1983*

Section 1983[14] was originally enacted as section 1 of the Ku Klux Klan Act of April 20, 1871.[15] The Act was passed in response to general lawless conditions in the South following the Civil War, particularly atrocities committed by the Ku Klux Klan.[16] While the Klan's activities impelled passage of the Act, the remedy created was not directed at the Klan or at private individuals such as Klan

13. *See, e.g.*, Gullatte v. Potts, 654 F.2d 1007 (5th Cir. 1981); Beard v. Mitchell, 604 F.2d 485, 494-95 (7th Cir. 1979); *infra* notes 240-53 and accompanying text.

14. 42 U.S.C. § 1983 (Supp. IV 1980).

15. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

16. For a more thorough discussion of the background of § 1983, see Monroe v. Pape, 365 U.S. 167 (1961); *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

members.[17] Instead, the statute imposed civil liability upon representatives of the state who were unable or unwilling to enforce state laws against unlawful Klan activities.[18] Thus, section 1983 provides a federal cause of action for damages and equitable relief against any "person" who, acting under color of state law, causes a deprivation of rights secured by the Constitution of the United States.[19]

1. *Individual Liability under Section 1983.*—State and local government officials who deprive individuals of constitutional rights may be held personally liable under section 1983 for damages caused by their unconstitutional conduct.[20] Liability attaches regardless of whether the officials' actions are authorized by the governmental entity that employs them.[21] The requirement that the constitutional deprivation be inflicted by one acting under color of state law, however, excludes federal officials from the reach of the statute.[22] Simi-

17. 42 U.S.C. § 1985(3) (Supp. IV 1980), however, does provide a civil remedy against private persons who, acting with some racial or other "class-based, invidiously discriminatory animus," conspire to deprive an individual of constitutional rights. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). 18 U.S.C. § 241 (1976) establishes criminal penalties for private conspiracies to violate constitutional rights. *See* United States v. Guest, 383 U.S. 745 (1966).

18. The Supreme Court, in Monroe v. Pape, 365 U.S. 167 (1961), identified three principal aims of § 1983: (1) overriding unconstitutional state laws, *see id.* at 173, (2) providing a remedy where state law was inadequate to protect constitutional rights, *see id.* at 173-74, and (3) providing a federal remedy where state law was adequate, in theory, to guarantee federal rights but was not available in practice because of the failure of state officials to enforce those laws, *see id.* at 174-75. The *Monroe* Court did not specifically address whether § 1983 would be available where state law was sufficient both in theory and in practice. The Supreme Court, however, recently affirmed that regardless of the adequacy of state administrative remedies, exhaustion of such remedies is not a prerequisite to an action under § 1983. *See* Patsy v. Board of Regents, 102 S. Ct. 2557 (1982). *But see* Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 116 (1981) (principle of comity bars § 1983 actions in federal courts alleging the invalidity of state tax systems, provided that state remedies are "plain, adequate, and complete").

19. *See supra* note 2. In addition to providing a remedy for constitutional violations, § 1983 imposes liability on persons acting under color of state law who violate rights protected by a federal statute, whether or not the statute concerns civil rights or equal protection. *See* Maine v. Thiboutot, 448 U.S. 1 (1980). However, § 1983 will not support a cause of action to redress violation of a federal statute by state officials where (1) the statute does not create enforceable rights under § 1983, or (2) Congress intended to foreclose enforcement of the statute through § 1983. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Pennhurst State School and Hosp. v. Halderman. 451 U.S. 1 (1981).

20. Although a judgment under § 1983 is enforceable against the individual official, many state and local governments indemnify their employees against such liability. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-465 (West Supp. 1982) (local officials); MD. ANN. CODE art. 78A, § 16C (Supp. 1982) (state officers); MISS. CODE ANN. § 25-1-47 (1972) (local officials); N.Y. PUB. OFF. LAW § 17 (McKinney Supp. 1982-1983) (state officers).

21. *See* Monroe v. Pape, 365 U.S. 167 (1961).

22. District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973); Askew v. Bloemker,

larly, private individuals are not subject to liability under section 1983 unless their conduct is so intertwined with state or local governmental functions as to constitute state action.[23]

2. *Municipal Liability under Section 1983.*—When it first confronted the issue of municipal liability, the Supreme Court, in *Monroe v. Pape*,[24] held that municipalities were not "persons" within the meaning of section 1983 and, thus, were not amenable to suit under the statute.[25] The Court rested its decision solely on the legislature's rejection of the proposed Sherman Amendment to the Ku Klux Klan Act of 1871. The Amendment would have imposed liability on a municipality for all damages caused by conspiracies to interfere with constitutional rights within its boundaries.[26]

Seventeen years later, in *Monell v. Department of Social Services*,[27] the Court reconsidered the issue of municipal liability under section 1983. Contrary to its construction of the legislative history in *Monroe*, the Court found that congressional rejection of the Sherman Amendment was not a blanket repudiation of municipal liability, but rather was premised on the concern that the federal government could not constitutionally require a municipality to keep the peace if the state had neither obligated nor authorized the municipality to do so.[28] This constitutional infirmity would not pertain,

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548 F.2d 673, 676-78 (7th Cir. 1976).

23. The Supreme Court has held that any conduct that constitutes state action under the fourteenth amendment also is action under color of state law for purposes of § 1983. Rendell-Baker v. Kohn, 102 S. Ct. 2764 (1982); Lugar v. Edmondson Oil Co., 102 S. Ct. 2744 (1982).

24. 365 U.S. 167 (1961).

25. *See id.* at 187-92.

26. The Sherman Amendment, as originally proposed and passed in the Senate, imposed liability on inhabitants of a municipality for damages from constitutional violations caused by "persons riotously and tumultuously assembled together." CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871). The House rejected the amendment as passed by the Senate and referred it to a conference committee. The committee reported another version that provided a cause of action directly against the county, city or parish in which the constitutional deprivation occurred. Furthermore, this version held the government entity liable for any unsatisfied judgment against the individual defendants who had caused the deprivation. *Id.* at 749. As was true of the original amendment, the conference committee report was passed by the Senate but rejected by the House.

A second conference was called and a substitute for the Sherman Amendment was reported that entirely abandoned municipal liability. This conference report instead imposed liability on persons who, having knowledge of a conspiracy to violate civil rights and the power to prevent or aid in preventing such violations, failed to attempt to prevent the conspiracy. *Id.* at 804. This amendment was adopted by the Congress and is currently codified at 42 U.S.C. § 1986 (1976).

27. 436 U.S. 658 (1978).

28. *Id.* at 668.

however, if a federal statute held a municipality responsible for failing to prevent constitutional violations only when the municipality was empowered and compelled to do so under state law.[29] Similarly, no constitutional objection to municipal liability could be lodged when the municipality itself violated individual rights protected by the Constitution.[30] Thus, the Court concluded, rejection of the Sherman Amendment did not necessarily reflect congressional animosity toward imposition of municipal liability, provided such liability was crafted to be consistent with the constitutional power of the federal government.[31]

Having disavowed the sole basis upon which it had repudiated municipal liability in *Monroe*, the Court proceeded to analyze whether Congress intended the term "person" in section 1983 to encompass municipalities. The Court found that both supporters and opponents of the Act recognized that the statute was to be construed broadly and liberally.[32] Furthermore, the legislative debates evidenced Congress' understanding that "persons" included municipal corporations, an interpretation shared at the time by the courts.[33] This construction of the term "persons" was corroborated by the Dictionary Act,[34] enacted only months before passage of the Ku Klux Klan Act of 1871, which provided: "[I]n all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense . . . ."[35] In 1871, municipal corporations were generally considered to be "bodies politic and corporate."[36] Thus, the Court held, the "plain meaning" of section 1 of the Ku Klux Klan Act of 1871, the precursor of section 1983, is that municipalities are "persons" subject to liability under the Act.[37]

Although acknowledging that municipalities are accountable under section 1983, the *Monell* Court refused to hold municipalities vicariously liable for all constitutional deprivations committed by their employees. Instead, municipal liability was limited to instances

29. *See id.* at 679-80.
30. *Id.* at 680-81.
31. *See id.* at 681-83.
32. *See id.* at 683-86.
33. *See id.* at 686-89.
34. Act of Feb. 25, 1871, ch. 71, 16 Stat. 431.
35. *Id.* § 2.
36. *Monell*, 436 U.S. at 688.
37. *Id.* at 689.

where the alleged unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"[38] or is conducted "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels."[39]

3. *Liability of States under Section 1983.*—The issue of state liability under section 1983 raises an additional question—whether an action against a state brought in federal court pursuant to section 1983 is barred by the eleventh amendment to the United States Constitution. The amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[40] This immunity from suit in federal court does not extend to municipalities, which are deemed not to be part of the state for eleventh amendment purposes.[41] Thus, the Supreme Court did not confront the immunity question in deciding whether Congress intended municipalities to be liable as "persons" under section 1983. When considering whether states are subject to liability under the statute, however, the Supreme Court had to address the eleventh amendment issue.

In *Fitzpatrick v. Bitzer*,[42] the Court held that Congress has the authority to abrogate the states' eleventh amendment immunity, pursuant to the enforcement provisions of section five of the fourteenth amendment.[43] Because section 1983 was enacted specifically to enforce rights guaranteed by the fourteenth amendment, resolution of the issue of state liability under the statute turns on whether Congress intended to waive the states' constitutional immunity.

The Supreme Court first considered the issue of Congress' intent to impose liability on states under section 1983 in *Edelman v.*

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38. *Id.* at 690.

39. *Id.* at 691. For an excellent critical analysis of the Court's rejection of vicarious liability, see Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979).

40. U.S. CONST. amend. XI. The amendment has been interpreted to extend to suits against a state by citizens of that state. *See* Hans v. Louisiana, 134 U.S. 1 (1890). Justice Brennan continues to dissent from this interpretation. Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting).

41. Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

42. 427 U.S. 445 (1976).

43. *Id.* at 456.

Jordan,[44] a class action alleging that various state officials administered the federal-state program of Aid to the Aged, Blind and Disabled in violation of federal regulations and the Constitution. The Seventh Circuit Court of Appeals had affirmed the district court's grant of both a permanent injunction requiring compliance with the federal regulations and retroactive benefits that had been wrongfully withheld.[45] The Supreme Court reversed the award of retroactive benefits.[46] Even though the State of Illinois was not a named defendant, the Court reasoned, the award was barred by the eleventh amendment since payment of the benefits would come from the treasury of the state and not the pockets of the individual defendants.[47] Rejecting the position of the court of appeals, the Supreme Court held that Congress did not intend to abrogate the states' eleventh amendment immunity when it authorized an action against state officials under section 1983.[48]

Edelman was decided before the landmark opinion in *Monell*, at a time when the Court limited the scope of section 1983 to individual government officials.[49] Not surprisingly, the issue of state liability under section 1983 reached the Supreme Court again, in the wake of *Monell*, in a pair of cases, *Alabama v. Pugh*[50] and *Quern v. Jordan*.[51]

In *Pugh*, the Court granted certiorari to consider the propriety of an injunction that ordered the State of Alabama, its Board of Corrections and several state officials to eradicate unconstitutional conditions in the Alabama prison system.[52] In a per curiam opinion issued without briefs or oral argument, the Court reversed the injunction against the state and the Board of Corrections on the ground that suit against these entities was barred by the eleventh amendment, absent the state's consent to suit.[53]

While some question remained whether *Pugh* resolved the issue

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44. 415 U.S. 651 (1974).

45. Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973), *rev'd sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).

46. *Edelman*, 415 U.S. at 659.

47. *See id.* at 665.

48. *Id.* at 674-78.

49. The Court in *Monell* expressly limited its holding to local governmental units. 436 U.S. at 690 n.54.

50. 438 U.S. 781 (1978) (per curiam).

51. 440 U.S. 332 (1979).

52. 438 U.S. at 781, 782 & n.2.

53. *Id.* at 782.

of state liability under section 1983,[54] any doubt was dispelled in *Quern*. In *Quern*, a sequel to *Edelman*, the Court considered whether the eleventh amendment barred the federal court from ordering state officials to send a notice advising members of the plaintiff class of the availability of state administrative procedures to redress the wrongful denial of welfare benefits.[55] Although the Court ultimately found the order to be ancillary to prospective relief[56] and thus not proscribed by the eleventh amendment, it nevertheless examined whether Congress intended to abrogate the states' eleventh amendment immunity when it enacted section 1983.[57] After reviewing the language and legislative history of section 1983, the Court found that a "clearer showing of congressional purpose" was necessary to vacate the states' immunity.[58] It thus reaffirmed its decisions in *Edelman* and *Pugh* that held that states are not amenable to suit under section 1983.[59]

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54. Justice Stevens, dissenting, stated: "Surely the Court does not intend to resolve summarily the issue . . . . " *Id.* at 783 n.*. Justice Brennan, in his opinion concurring in the judgment in Quern v. Jordan, 440 U.S. 332, 352 (1979) (Brennan, J., concurring), noted that both the petition for certiorari and the respondent's opposition to the petition in *Pugh*, the only submissions by the parties, were filed before the *Monell* opinion was announced. The respondent did not even raise the argument that states were "persons" within the meaning of § 1983. *Id.* at 353 (Brennan, J., concurring).

55. 440 U.S. at 334. As in *Pugh*, however, the parties did not raise the issue. The majority found the issue presented by the respondent's suggestion in a footnote contained in its brief, Brief for Respondent at 55 n.37, *Quern*, that the "decision in *Edelman* had been eviscerated by" *Monell*. *Quern*, 440 U.S. at 338. However, as Justice Brennan observed in his concurring opinion, in that same footnote the respondent further stated " 'it is unnecessary in this case to confront directly the far-reaching question of whether Congress intended in § 1983 to provide for relief directly against States, as it did against municipalities.' " *Id.* at 354 (Brennan, J., concurring) (quoting Brief for Respondent at 55 n.37). The petitioner agreed, plainly stating: " 'That issue is not the issue before this Court on Petitioner's Writ for Certiorari.' " *Id.* (Brennan, J., concurring) (quoting Reply Brief for Petitioner at 14).

56. 440 U.S. at 349. Although a state may not be a named defendant in an action in federal court, the state may, in essence, be reached through a suit brought against a state officer in his official, as opposed to individual, capacity. *Ex parte* Young, 209 U.S. 123 (1908). One may obtain only prospective relief, however, in such actions. *Compare* Hutto v. Finney, 437 U.S. 678 (1978) (award of attorney's fees against state for defending litigation in bad faith not barred by eleventh amendment) *with* Edelman v. Jordan, 415 U.S. 651 (1974) (award of retroactive welfare benefits that would come out of state treasury, barred by eleventh amendment, absent consent of state).

57. *See* 440 U.S. at 334-45. Justice Brennan, in an opinion concurring in the judgment and joined by Justice Marshall, vigorously objected to the propriety of reaching out to decide the issue, which he believed unnecesary to the Court's holding. *Id.* at 350 (Brennan, J., concurring).

58. *Id.* at 343.

59. *Id.* at 338-41. Several courts have found *Quern* not to foreclose a § 1983 claim against a state where the state has waived its eleventh amendment immunity. *See* Irwin v.

B. *The Standard of Culpability Imposed by Section 1983 as an Element of Plaintiff's Cause of Action*[60]

1. *Background.*—The United States Supreme Court did not have occasion to consider what degree of culpability a plaintiff must prove to establish liability under section 1983[61] until ninety years after the passage of the statute, in the seminal case *Monroe v. Pape.*[62] *Monroe* arose out of the alleged warrantless invasion and search of the Monroe home and the subsequent warrantless arrest and detention of Mr. Monroe by Chicago police officers. Distinguishing 18 U.S.C. § 242,[63] which imposes criminal sanctions only for intentional deprivations of constitutional rights under color of state law, the Court held that the Monroes were not required to prove that the police officers specifically intended to deprive them of a federal right, in order to recover under section 1983.[64]

Although the *Monroe* Court expressly repudiated a specific intent requirement, it failed to precisely define the degree of culpability that a plaintiff must prove to establish a prima facie case under section 1983. The Court did declare that "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[65] The lower federal courts, however, have accorded widely varying interpretations to this "standard." The majority of courts agree that section 1983 imposes liability for negligent conduct.[66] Others hold that the

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Calhoun, 522 F. Supp. 576, 583-84 (D. Mass. 1981); Marrapese v. Rhode Island, 500 F. Supp. 1207, 1209-12 (D.R.I. 1980); Bailey v. Ohio State Univ., 487 F. Supp. 601, 603 (S.D. Ohio 1980) (dicta).

60. This section of the article analyzes only the standard of fault that § 1983 requires the plaintiff to prove to establish a prima facie case, apart from any degree of culpability that the plaintiff additionally may have to prove to demonstrate that he has suffered a particular constitutional deprivation. For a discussion of the issue of the culpability requirements imposed by specific provisions of the Constitution, see *infra* notes 255-92 and accompanying text.

61. 42 U.S.C. § 1983 (Supp. IV 1980).

62. 365 U.S. 167 (1961).

63. 18 U.S.C. § 242 (1976) provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

64. *See* 365 U.S. at 187.

65. *Id.*

66. SECOND CIRCUIT: United States *ex rel.* Larkins v. Oswald, 510 F.2d 583, 588-

statute demands proof that the defendant's actions were intentional

89 (2d Cir. 1975); Wright v. McMann, 460 F.2d 126, 135 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972). In *Wright*, the court held a prison warden liable for unconstitutional prison conditions of which he knew or should have known. It is clear that liability was premised on negligence since the district court expressly found no deliberate or reckless action warranting punitive damages. Wright v. McMann, 321 F. Supp. 126, 144 (N.D.N.Y. 1970). *But see* Doe v. New York City Dep't of Social Servs., 649 F.2d 134, 141 (2d Cir. 1981) (proof of "deliberate indifference" required to state a claim for relief for failure to supervise); Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980) ("The decisions of this court suggest that something more than simple negligence is required."). FIFTH CIRCUIT: Fox v. Sullivan, 539 F.2d 1065, 1065-66 (5th Cir. 1976); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976); Parker v. McKeithen, 488 F.2d 553, 556 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974); Beverly v. Morris, 470 F.2d 1356, 1357 (5th Cir. 1972); Roberts v. Williams, 456 F.2d 819, 831-32 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971). SIXTH CIRCUIT: Fitzke v. Shappell, 468 F.2d 1072, 1077 n.7 (6th Cir. 1972); Puckett v. Cox. 456 F.2d 233, 235 (6th Cir. 1972). EIGHTH CIRCUIT: Taylor v. Parratt, 620 F.2d 307 (8th Cir. 1980) (mem.), *rev'd on other grounds*, 451 U.S. 527 (1981); Jennings v. Davis, 476 F.2d 1271, 1275 (8th Cir. 1973); *see* Russ v. Ratliff, 538 F.2d 799, 805 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (dismissal of § 1983 action proper where no showing of unlawful or negligent conduct). *But see* Brown v. United States, 486 F.2d 284, 287 (8th Cir. 1973) ("[W]e are extremely hesitant to hold that mere simple negligence can be the basis of personal liability under § 1983.") (dicta). NINTH CIRCUIT: Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978) (dicta); Navarette v. Enomoto, 536 F.2d 277, 281 (9th Cir. 1976), *rev'd on other grounds sub nom.* Procunier v. Navarette, 434 U.S. 555 (1978). *But see* Williams v. Field, 416 F.2d 483, 485 (9th Cir. 1969), *cert. denied*, 397 U.S. 1016 (1970) ("It may be that negligent conduct, in the appropriate circumstances, will support an action under section 1983. . . . Mere negligent failure to act, standing alone, however, would seem insufficient."). TENTH CIRCUIT: McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979); Williams v. Anderson, 599 F.2d 923, 926 (10th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980). *But see* Martin v. Duffie, 463 F.2d 464, 467 (10th Cir. 1972) (proof of invasion of rights establishes prima facie case under § 1983). DISTRICT OF COLUMBIA CIRCUIT: Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

The Court of Appeals for the First Circuit has not specifically addressed the standard of culpability imposed by § 1983. *See* Leite v. City of Providence, 463 F. Supp. 585, 589 n.3 (D.R.I. 1978).

In Hoitt v. Vitek, 497 F.2d 598 (1st Cir. 1974), the First Circuit did hold that a plaintiff need not allege specific intent to violate constituitonal rights, adopting the "background of tort liability" language of *Monroe v. Pape*, 365 U.S. at 187. *Hoitt*, 497 F.2d at 602 & n.4. Furthermore, in describing what proof was necessary to establish a right to injunctive relief under § 1983, where no qualified immunity is applicable, the court apparently recognized that negligence is actionable:

> A complaint seeking an injunction, alleging in suitable detail an extensive and *unreasonable* continuation of a lockup after the termination of an emergency, would survive a motion to dismiss; summary judgment would be appropriate where essential facts are undisputed.

Id. at 600 (emphasis added). The court then noted that proof of negligence may not be sufficient to overcome the qualified immunity defense. Where damages are sought, thus triggering the qualified immunity, "there must be proof of 'bad faith or at least such a degree of neglect or malice . . . as to deprive defendants of official immunity for merely erroneous action.' " *Id.* at 601 (quoting Palmigiano v. Mullen, 491 F.2d 978, 980 (1st Cir. 1974)).

This same distinction was implicitly recognized in Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973), *vacated*, 418 U.S. 908 (1974), where the circuit court granted injunctive relief

or reckless.[67] At the opposite pole, some courts maintain that in order to prevail, a plaintiff need only establish a constitutional violation caused by a person acting under color of law, without further proof of culpability.[68] Still other courts find the standard of fault

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without inquiring into the reasonableness of the due process violation, but refused to award damages because the individual defendants could not have known from preexisting law that their conduct was unconstitutional. *Id.* at 1292-93. In Nadeau v. Helgemoe, 561 F.2d 411 (1st Cir. 1977), the court affirmed the issuance of an injunction to expand prisoners' library privileges without inquiring whether denial of such access was negligent or reckless.

The Third Circuit similarly has not directly addressed the issue of what culpability requirement is imposed by § 1983. *See* Popow v. City of Margate, 476 F. Supp. 1237, 1243 (D.N.J. 1979). In Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972), the court rejected a specific intent requirement for § 1983 actions and recited the familiar rule of *Monroe v. Pape*, that proof of violation of the statute proceeds against the background of tort liability:

> Thus, although proof of specific intent to deprive a person of his federally protected rights is not required, there must be at least proof of the "condition usually demanded by the law for liability in an action of tort [which] is the existence of either wrongful intention or culpable negligence on the part of the defendant." Salmond, Law of Torts, 6th Ed. 1924, p. 11.

Id. at 279. The court, however, did not define "culpable negligence." *Howell* has since been cited by other courts both for the proposition that negligence is actionable and for the proposition that negligence does not state a claim under § 1983. *Compare* Navarette v. Enomoto, 536 F.2d 277, 281 & n.4 (9th Cir. 1976), *rev'd sub nom.* Procunier v. Navarette, 434 U.S. 555 (1978) *with* Bonner v. Coughlin, 545 F.2d 565, 568 & n.8 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978).

In a subsequent case, the Third Circuit, without opinion, affirmed a district court holding that negligence is a sufficient basis for liability where the constitutional provision violated does not require proof of a greater degree of culpability. Norton v. McKeon, 444 F. Supp. 384 (E.D. Pa. 1977), *aff'd mem.*, 601 F.2d 575 (3d Cir. 1979).

The district courts in the Third Circuit have split over the issue of whether neligence is actionable. *Compare* Jones v. City of Philadelphia, 491 F. Supp. 284, 287 (E.D. Pa. 1980); Popow v. City of Margate, 476 F. Supp. 1237, 1242-43 (D.N.J. 1979); Croswell v. O'Hara, 443 F. Supp. 895 (E.D. Pa. 1978); Schweiker v. Gordon, 442 F. Supp. 1134 (E.D. Pa. 1977) (negligence not sufficient) *with* Culp v. Devlin, 437 F. Supp. 20 (E.D. Pa. 1977); Santiago v. City of Philadelphia, 435 F. Supp. 136, 150 (E.D. Pa. 1977) (negligence actionable unless specific constitutional provision requires greater degree of culpability).

67. The Seventh Circuit is the only court of appeals that consistently holds that § 1983 generally requires proof that the defendant's actions were intentional or in reckless disregard of the plaintiff's constitutional rights. *See, e.g.*, Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980); Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978). *But see* Bonner v. Coughlin, 657 F.2d 931, 933 n.3 (7th Cir. 1981) ("The Supreme Court only recently issued its opinion in Parratt v. Taylor, [451] U.S. [527] (1981) which now apparently would allow a § 1983 claim based upon a negligent deprivation of property by prison guards."). Other courts have demanded proof of recklessness or intent where the analogous tort, usually malicious prosecution, requires such proof. *See, e.g.*, Kacher v. Pittsburgh Nat'l Bank, 545 F.2d 842, 847 (3d Cir. 1976) (malicious prosecution); Tucker v. Maher, 497 F.2d 1309, 1315 (2d Cir.), *cert. denied*, 419 U.S. 997 (1974) (malicious prosecution); Madison v. Manter, 441 F.2d 537, 538 (1st Cir. 1971) (malicious prosecution); Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963), *cert. denied*, 375 U.S. 975 (1964) (malicious prosecution).

68. Several courts of appeals have acknowledged that § 1983 does not impose any culpability requirement. The Fourth Circuit has repeatedly held that once the plaintiff establishes a

imposed by section 1983 to be determined, on a case-by-case basis, by reference to the analogous tort.[69] Cognizant of the myriad results reached by the lower federal courts in the wake of *Monroe*, the Supreme Court subsequently has granted certiorari three times to consider the degree of culpability that a plaintiff must establish to state a claim for relief under section 1983. Nevertheless, the issue remains unsettled.

The first case that presented the culpability question to the Supreme Court was *Procunier v. Navarette*.[70] Navarette, an inmate of Soledad Prison,[71] averred that three subordinate prison officials had " 'negligently and inadvertently' misapplied . . . prison mail regulations" and three supervisory officials had negligently failed to provide sufficient training and direction to their subordinates concerning those regulations.[72] As a result, Navarette submitted, letters he had authored were not mailed, violating his rights under the first, fifth and fourteenth amendments to the United States Constitution.[73]

The Supreme Court granted certiorari to consider "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983."[74] Treating this question as subsuming the issue of the prison officials' immunity, the Court held that because the asserted constitutional rights had not been clearly established at the time of the alleged deprivation, the defendants were immune from liability as a matter of law.[75] Having disposed of

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constitutional violation committed by one acting under color of state law, he need not prove any further culpability to recover damages. *E.g.*, Withers v. Levine, 615 F.2d 158, 162 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); Pritchard v. Perry, 508 F.2d 423, 425 (4th Cir. 1975); McCray v. Maryland, 456 F.2d 1, 5-6 (4th Cir. 1972); Jenkins v. Averett, 424 F.2d 1228, 1232-33 (4th Cir. 1970). In each of these cases, however, the constitutional violation consisted of negligent conduct. The Second and Tenth Circuit Courts of Appeals at times have held that proof of any invasion of constitutional rights establishes a prima facie case under § 1983. *See* Duchesne v. Sugarman, 566 F.2d 817, 831-32 (2d Cir. 1977); Martin v. Duffie, 463 F.2d 464, 467 (10th Cir. 1972); Stringer v. Dilger, 313 F.2d 536, 540 (10th Cir. 1963).

69. Where the analogous tort imposes strict liability, such as for false imprisonment, proof of even negligence is unnecessary to state a claim for relief under § 1983. *See* Patzig v. O'Neil, 577 F.2d 841, 849 n.9 (3d Cir. 1978); Bryan v. Jones, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976) (reversing Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969), which had held that no good faith defense was applicable to § 1983 action for false imprisonment). If the analogous tort requires proof of intent, intent is held to be a prerequisite to § 1983 liability. *See supra* note 67.

70. 434 U.S. 555 (1978).

71. *Id.* at 556.

72. *Id.* at 558.

73. *Id.* at 557-58.

74. *Id.* at 559 n.6.

75. *See infra* notes 151-53, 190-92 and accompanying text.

the case on immunity grounds, the Court expressly declined to address whether negligent deprivations of constitutional rights may be redressed under section 1983.[76]

The Supreme Court next considered the culpability issue in *Baker v. McCollan*.[77] The case arose out of the arrest and confinement of Linnie McCollan pursuant to a warrant intended for his brother, Leonard. Linnie was detained in jail in Potter County, Texas for four days, despite his protests of mistaken identification.[78] He subsequently sued the sheriff of Potter County and his surety under section 1983, alleging that the sheriff's negligent failure to establish identification procedures deprived him of liberty without due process of law in violation of the fourteenth amendment.[79]

The Supreme Court granted certiorari to consider whether an allegation of negligent conduct supports a cause of action under section 1983,[80] but again did not reach the issue. The Court noted that a person arrested pursuant to a warrant valid under the fourth amendment is not entitled to a separate judicial determination of probable cause to detain him pending trial.[81] Since McCollan was arrested under a facially valid warrant, the Court held that his continued detention without a hearing did not amount to an unconstitutional deprivation of liberty without due process of law.[82] Because McCollan suffered no constitutional violation, the Court concluded that it had no cause to determine the degree of culpability necessary to establish liability under section 1983.[83]

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76. *Procunier*, 434 U.S. at 566 n.14. Chief Justice Burger, dissenting, asserted that the immunity issue was not comprised within the question of whether negligent conduct is actionable under § 1983 and, therefore, should not have been considered. *Id.* at 567 (Burger, C.J., dissenting). He then opined:

> Neither the language nor the legislative history of § 1983 indicates that Congress intended to provide remedies for negligent acts.
>
> I would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim is not liable for damages under § 1983.

Id. at 568 (Burger, C.J., dissenting).

77. 443 U.S. 137 (1979).

78. *Id.* at 141.

79. *See id.* at 139, 142.

80. *Id.* at 139.

81. *Id.* at 143.

82. *See id.* at 145-47. Justice Stevens, joined by Justices Brennan and Marshall, dissented on the ground that the due process clause requires procedures "reasonably calculated to establish that a person being detained for the alleged commission of a crime was in fact the person believed to be guilty of the offense." *Id.* at 150 (Stevens, J., dissenting).

83. *Id.* at 140. Though the *Baker* Court expressly declined to resolve the culpability issue, Justice Rehnquist, writing for the majority, offered a significant observation. He noted

2. *Parratt v. Taylor.*—Against this background, the Supreme Court, in *Parratt v. Taylor*,[84] once again tackled the culpability issue. Bert Taylor, Jr., an inmate at the Nebraska Penal and Correctional Complex, brought a section 1983 action against the warden and hobby manager of the institution for damages for the loss of hobby materials that had been mailed to Taylor at the prison. Taylor averred that because of the defendants' negligence, he had been deprived of property without due process of law in violation of the fourteenth amendment.[85]

The district court granted Taylor's motion for summary judgment, holding that the defendants had negligently deprived him of his fourteenth amendment due process rights and that proof of the defendants' negligence entitled Taylor to recovery under section 1983.[86] In an unpublished per curiam opinion, the court of appeals affirmed the judgment of the district court.[87] The Supreme Court granted certiorari to consider whether negligence may form the basis for a judgment under section 1983, as well as whether the availability of a postdeprivation state tort remedy provided Taylor with sufficient process to satisfy the fourteenth amendment.[88]

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that "the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place, quite apart from the issue of whether § 1983 contains some additional qualification of that nature before a defendant may be held to respond in damages," *id.* at 140 n.1, thus intimating that there may be no uniform standard of culpability applicable to all § 1983 actions. *See infra* notes 255-92, 392-95 and accompanying text.

84. 451 U.S. 527 (1981).

85. *Id.* at 529.

86. The district court also ruled that the defendants had no qualified immunity because they knew, or should have known, that their actions could result in a violation of Taylor's constitutional rights. Taylor v. Parratt, No. 76-L-57 Civ. (D. Neb. Oct. 25, 1978).

87. The court of appeals opinion, in toto, reads as follows:

> This is an appeal from a summary judgment granted appellee, Taylor, by the district court. The appellee brought the action under 42 U.S.C. § 1983 claiming that prison officials had violated his constitutional rights by negligently depriving him of property without due process.
>
> We have thoroughly examined the record and now determine that, based upon the record and the oral arguments, the judgment of the trial court should be affirmed.
>
> Accordingly, pursuant to Rule 14 of the Rules of this court, the judgment of the district court is affirmed.

Taylor v. Parratt, No. 79-1514 (8th Cir., Jan. 29, 1980).

88. *See* Petition for Writ of Certiorari 2, Parratt v. Taylor, 451 U.S. 527 (1981). As Justice Marshall observed in his dissenting opinion, the latter issue was first presented in the petition for rehearing, which was denied by the court of appeals. *Parratt*, 451 U.S. at 556 n.2 (Marshall, J., dissenting).

The petitioners also presented the questions of whether the loss of Taylor's property was

As in *Baker*,[89] the Supreme Court found no constitutional violation. Although it agreed that the defendants' negligence deprived Taylor of a constitutionally protected property interest, the Court held that the Nebraska tort claims act afforded sufficient redress to satisfy the requirements of due process.[90] The fact that the tort claims procedure supplied only a postdeprivation hearing and would not provide Taylor the same relief available in a section 1983 action did not render such process constitutionally infirm.[91] Because the state could not predict when negligent losses of property would occur, the Court reasoned, it could not realistically be required to hold a hearing prior to such deprivations.[92]

Contrary to its decision in *Baker*, the Supreme Court in *Parratt* did not regard consideration of the standard of culpability under section 1983 to be precluded by its ultimate finding that Taylor had not been deprived of a constitutional right. Indeed, the Court addressed whether negligent conduct is actionable under section 1983 before

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de minimis and, therefore, not protected by the fourteenth amendment, and whether the record supported a finding of negligence. Petition for Writ of Certiorari at 2. The Supreme Court implicitly rejected the former claim and, for purposes of its opinion, accepted that defendants were negligent. *Parratt*, 451 U.S. at 537 n.3.

89. For a discussion of *Baker*, see *supra* notes 77-83 and accompanying text.

90. 451 U.S. at 543-44.

91. *Id.* The Nebraska tort claims procedure only provides an action against the state as opposed to individual state officials, does not allow punitive damages, and affords no right to trial by jury. *See* NEB. REV. STAT. § 81-8209 (1981). The Federal Tort Claims Act, however, does not preclude action for damages brought directly under the Constitution. *See* Carlson v. Green, 446 U.S. 14 (1980). *See infra* text accompanying notes 323-26.

92. 451 U.S. at 541. Justice Blackmun, concurring, maintained that postdeprivation process may not satisfy the fourteenth amendment where a state official intentionally deprives a person of property. *Id.* at 545-46 (Blackmun, J., concurring). Although the state cannot provide a meaningful hearing before deprivation of property caused by negligent acts of state employees, Justice Blackmun opined, the state, in most instances, could and, as a matter of due process, should be required to institute procedures to prevent intentional takings of property by state employees. *Id.* at 546 (Blackmun, J., concurring). Under Justice Blackmun's view, the culpability of the defendant would be apposite to whether the due process clause of the fourteenth amendment was violated. *See id.* at 545-46 (Blackmun, J., concurring); *see also infra* text accompanying notes 284-88.

Justice Blackmun also interpreted the Court's opinion as limited to deprivations of property, as opposed to deprivations of life or liberty. 451 U.S. at 545 (Blackmun, J., concurring). Courts have reached conflicting results with respect to deprivations of liberty. *Compare* Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177 (M.D. Tenn. 1982) (postdeprivation remedy constitutionally inadequate to redress deprivation of liberty) *with* Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (postdeprivation tort remedy satisfies due process where no practical way to afford hearing before deprivation of liberty), *aff'd sub nom.* Kush v. Rutledge, 51 U.S.L.W. 4356 (U.S. Apr. 4, 1983) (No. 81-1675).

examining whether any constitutional violation was indicated.[93] Thus, the Court's ruling on the issue arguably could be deemed dictum. However, it is well settled that the Supreme Court will avoid deciding a constitutional question if resolution of a statutory issue will dispose of a case.[94] Under this principle, the Court appropriately entertained the statutory question before reviewing whether the plaintiff's constitutional right was violated.

Justice Rehnquist, writing for the majority, first addressed the culpability issue by observing that neither the language nor legislative history of section 1983 limits the statute to intentional invasions of constitutional rights.[95] He then emphasized that the Court had never found section 1983 to contain a state-of-mind requirement, in contrast to the statute's criminal counterpart, 18 U.S.C. § 242, which the Court had interpreted to impose penalties only for acts done with specific intent to deprive a person of a federal right.[96] Justice Rehnquist concluded:

> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[97]

Although the Court never plainly stated that section 1983 affords a cause of action to redress constitutional violations caused by the negligence of a person acting under color of state law, its entire analysis suggests just such a holding.[98] Furthermore, pursuant to its

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93. *See* 451 U.S. at 534-35. The Court expressly acknowledged that its failure to decide the culpability question in *Procunier* and *Baker* has resulted in diverse approaches by the lower federal courts, *id.* at 532-33, and perhaps for this reason desired to rule on the issue.

94. Wood v. Strickland, 420 U.S. 308, 314 (1975); *see* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring) (enumeration of seven tenets of Supreme Court practice designed to avoid unnecessarily deciding constitutional issues).

95. *Parratt*, 451 U.S. at 534.

96. *Id.*

97. *Id.* at 535. Interestingly, Chief Justice Burger, who, in his dissenting opinion in *Procunier*, argued that § 1983 does not provide redress for negligent acts, 434 U.S. at 568 (Burger, C.J., dissenting), joined in the opinion of the Court in *Parratt*.

98. Justice Marshall, concurring in part and dissenting in part, joined the Court's opinion "insofar as it holds that negligent conduct by persons acting under color of state law may

policy of avoiding unnecessary constitutional questions, the Court presumably would not have adjudicated whether Taylor had been deprived of a constitutional right if it had found that negligence was not actionable under section 1983.

3. *The Elements of Plaintiff's Prima Facie Case.*—While *Parratt* apparently holds that negligent violations of constitutional rights may be redressed under section 1983, the facts of the case did not present an equally important issue—whether a plaintiff must even prove negligence to state a claim for relief under the statute. As the Court correctly pointed out in *Parratt*, section 1983, on its face, contains no culpability requirement.[99] The statutory language accurately reflects the intent of the legislature that enacted section 1 of the Civil Rights Act of 1871.[100] The legislative history of that Act plainly indicates that Congress intended section 1983 to afford a civil remedy for any and all deprivations of federally protected rights, without regard to the degree of culpability of the state actor who caused the deprivation. As Senator Edmunds, the manager of the bill in the Senate, stated, section 1 of the Act was "so very simple and really reenacting the Constitution."[101] Similarly, Representative Bingham declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution."[102] Representative Dawes, speaking in support of the Act, submitted that section 1 provides a remedy for any violation of the Constitution, without limitation:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Leg-

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be actionable under 42 U.S.C. § 1983." 451 U.S. at 554-55 (Marshall, J., concurring in part and dissenting in part). Lower federal courts have generally interpreted *Parratt* as holding that liability under § 1983 may be grounded upon negligence. *See, e.g.*, Fernandez v. Chardon, 681 F.2d 42, 55 (1st Cir.), *cert. denied*, 103 S. Ct. 343 (1982); Hirst v. Gertzen, 676 F.2d 1252, 1263 (9th Cir. 1982); Bonner v. Coughlin, 657 F.2d 931, 933 n.3 (7th Cir. 1981).

99. *See* 451 U.S. at 534.

100. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

101. CONG. GLOBE, *supra* note 26, at 569, *quoted in* Monell v. Department of Social Servs., 436 U.S. 658, 685 (1978).

102. CONG. GLOBE, *supra* note 26, at app. 81, *quoted in* Monell v. Department of Social Servs., 436 U.S. 658, 685 n.45 (1978).

> islature, they are in this law . . . . No subject for legislation was ever brought before the American Congress so broad and comprehensive . . . .
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> . . . .
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> . . . Whatever they be, he . . . who invades, trenches upon or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers . . . all there is in the first and second sections of this bill.[103]

In remarks cited by the Supreme Court in *Monroe v. Pape*,[104] then Speaker of the House Arthur plainly indicated that section 1 was not limited to actions of state officials that were negligent or otherwise culpable. As the Court noted:

> The speaker, Mr. Arthur of Kentucky, had no doubt as to the scope of § 1: "[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, *for a mere error in judgment*, [he is liable]. . . ."[105]

Even the opponents of the Act recognized that it required no more than proof of a constitutional violation caused by one acting under color of state law. Indeed, one of the grounds for opposition to section 1 was that it imposed liability for any violation of the Constitution, with no limitation. As Senator Thurman, opposing the bill, stated:

> It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.[106]
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> . . . .
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> . . . *[T]here is no limitation whatsoever upon the terms that*

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103. CONG. GLOBE, *supra* note 26, at 475-76.
104. 365 U.S. 167 (1961).
105. *Id.* at 174 n.10 (emphasis added) (quoting CONG. GLOBE, *supra* note 26, at 365).
106. CONG. GLOBE, *supra* note 26, at app. 216, *quoted in Monroe*, 365 U.S. at 179-80.

> *are employed [in the bill], and they are as comprehensive as can be used.*[107]

Engrafting a culpability requirement onto section 1983 would not only be contrary to the terms of the statute and the intent of the legislature, but would also violate the legislature's instruction that the statute should be construed broadly and liberally. Representative Shellabarger expressly described how the courts should interpret section 1 of the 1871 Act:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. . . . Chief Justice Jay and also Story say:
>
> > "Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of the laws."—1 *Story on Constitution*, sec. 429.[108]

The Supreme Court has recognized and followed the command of the legislature. It stressed, in *Gomez v. Toledo*,[109] that, "[a]s remedial legislation, § 1983 is to be construed generously to further its primary purpose."[110] In *Monell v. Department of Social Services*,[111] the Court relied on the legislature's instruction to construe broadly section 1 when it refused to exclude municipalities from the category of "persons" embraced by section 1983.[112] The Court reasoned that "absent a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation—which simply is not present—there is no justification for excluding municipalities from the 'persons' covered by §

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107. CONG. GLOBE, *supra* note 26, at app. 217 (emphasis added), *quoted in* Monell v. Department of Social Servs., 436 U.S. 658, 686 n.45 (1978).

108. CONG. GLOBE, *supra* note 26, at app. 68, *quoted in* Monell v. Department of Social Servs., 436 U.S. 658, 684 (1978).

109. 446 U.S. 635 (1980).

110. *Id.* at 639.

111. 436 U.S. 658 (1978).

112. *Id.* at 690.

1."[113] There is, similarly, no clear statement in the legislative history supporting the conclusion that section 1983 was to apply to constitutional deprivations only where the plaintiff also proves that the violations were caused by the defendant's negligence. Indeed, the plain intent of the legislature was that the statute provide a remedy for any violation of the Constitution.

Moreover, the Supreme Court has never affirmatively demanded proof of culpability under section 1983. To the contrary, it has uniformly required only allegation of the deprivation of a federal right caused by a person acting under color of state law to state a claim for relief. In *Douglas v. City of Jeannette*,[114] the Court held that federal courts had statutory jurisdiction over a section 1983 action to enjoin state criminal prosecution of Jehovah's Witnesses for violation of an allegedly unconstitutional city ordinance.[115] The Court then described the requisites of the cause of action:

> Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgement of the right is effected under color of a state statute or ordinance.[116]

The Court more clearly intimated that the plaintiff need not establish the defendant's negligence as part of his prima facie case in *Gomez*, where it held that the defendant has the burden of pleading entitlement to a qualified immunity.[117] Rejecting the contention that the plaintiff is required to plead the bad faith of the defendant, the Court specified the elements of a section 1983 action:

> By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.[118]

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113. *Id.* at 701.
114. 319 U.S. 157 (1943).
115. *Id.* at 161.
116. *Id.* at 162.
117. 446 U.S. at 640.
118. *Id.* Further support for the proposition that § 1983 imposes no culpability requirement may be found in *Monroe*, where the Court stated: "Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies . . . the requirement of R.S. § 1979 [42 U.S.C. § 1983]." 365 U.S. at 171.

Consistent with these precedents, the *Parratt* decision strongly suggests that section 1983 does not require the plaintiff to prove any degree of culpability—not even negligence—to state a cause of action. Noting that section 1983 contains no express state-of-mind predicate to liability, the Court, in *Parratt*, reiterated as the "essential elements" of the section 1983 cause of action the only two allegations that it previously held necessary to state a claim in *Gomez*—the deprivation of a federal right caused by a person acting under color of state law.[119]

In sum, the language and legislative history of section 1983, as well as decisions of the Supreme Court construing the statute, support the conclusion that the plaintiff is not required to prove negligence to state a prima facie claim for relief. This proposition is buttressed by analysis of a second potential source of a fault requirement in section 1983 actions—the qualified immunity.

C. *The Standard of Culpability Imposed by the Qualified Immunity*

1. *Evolution of the Qualified Immunity.*—Neither the language nor the legislative history of section 1983[120] makes reference to any immunity from liability once the plaintiff has established a deprivation of constitutional rights caused by a person acting under color of state law. Arguably, the enacting legislature's instruction to construe the statute broadly and liberally[121] counsels that, absent explicit congressional direction, courts should not engraft an immunity defense onto section 1983.[122] The Supreme Court, however, has

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Even Justice Frankfurter, who dissented from the extension of § 1983 to constitutional violations caused by conduct of state officials not authorized by or in conformity with state law, agreed that no culpability requirement should be engrafted onto § 1983: "If the courts are to enforce [§ 1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. . . . Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient." *Id.* at 207-08 (Frankfurter, J., dissenting).

119. 451 U.S. 527, 534-35 (1981).

120. 42 U.S.C. § 1983 (Supp. IV 1980).

121. *See supra* notes 103-08 and accompanying text.

122. *See supra* notes 99-113 and accompanying text.

Justice Marshall observed in dissenting from the Court's recent extension of absolute immunity to police officers in § 1983 actions arising out of allegedly perjured testimony in judicial proceedings that:

> The language of § 1983 provides unambiguous guidance in this case. A witness is most assuredly a "person," the word Congress employed to describe those whose conduct § 1983 encompasses. The majority turns the conventional approach to statutory interpretation on its head. It assumes that common-law tort immunities pro-

reached just the opposite conclusion. The Court, assuming that Congress would have specifically abrogated common law immunities if it so intended, has interpreted the legislature's silence as an implicit affirmation of those immunities for purposes of section 1983.[123] Thus, where an immunity was established at common law, and the policies underlying that immunity are compatible with the purposes of section 1983, Congress is presumed to have *sub silentio* incorporated the immunity as a defense to suits under section 1983.[124]

In *Owen v. City of Independence*,[125] the Supreme Court held that municipalities are not entitled to immunity from section 1983 liability founded upon the good faith of their officials.[126] The Court determined that municipalities were not generally immune from liability at common law, and it discerned nothing in the legislative history or policies underlying section 1983 that dictated a departure from the common law tradition.[127] Consequently, immunities do not enter into the analysis of the standard of culpability in section 1983 actions against municipalities.

At the opposite extreme, certain public officers retain their common law absolute immunity in suits complaining of constitutional violations caused by their official activities. State and regional legislators have been found absolutely immune from section 1983 liability in suits arising out of legislative acts, whether the complaint seeks

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vide an exemption from the plain language of the statute unless petitioners demonstrate that Congress meant to override the immunity. . . . Thus, in the absence of a clearly expressed legislative intent to the contrary, the Court simply presumes that Congress did not mean what it said.

Absolute immunity for witnesses conflicts not only with the language of § 1983 but also with its purpose. In enacting § 1983, Congress sought to create a damage action for victims of violations of federal rights; absolute immunity nullifies "*pro tanto* the very remedy it appears Congress sought to create." *Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (WHITE, J., concurring in the judgment). The words of a statute should always be interpreted to carry out its purpose. Moreover, members of the 42d Congress explicitly stated that § 1983 should be read so as to further its broad remedial goals.

Briscoe v. Lahue, 103 S. Ct. 1108, 1122 (1983) (Marshall, J., dissenting) (footnotes omitted).

123. *See* Pierson v. Ray, 386 U.S. 547, 554-55 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

124. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59 (1981); Imbler v. Pachtman, 424 U.S. 409, 424 (1976).

125. 445 U.S. 622 (1980).

126. *Id.* at 638, 657.

127. *See id.* at 635-57. In City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Court held that municipalities do retain their common law immunity from punitive damages.

legal or equitable relief.[128] State and local judges are similarly shielded from liability for judicial acts within their jurisdictions, although the federal courts have divided over whether this absolute immunity extends to actions for equitable relief.[129] Prosecutors possess absolute immunity for initiating prosecutions and presenting the government's case.[130] Most recently, the Supreme Court held that police officers are absolutely immune from section 1983 liability founded on their allegedly perjured testimony in judicial proceedings.[131] These absolute immunities stand as a complete defense to liability, regardless of whether the official has acted negligently, recklessly, or even with an intent to violate the Constitution.[132] Thus, where the absolute immunity is applicable, the degree of culpability of the defendant becomes irrelevant.

Other government officials, though not protected by an absolute immunity, may invoke a qualified immunity as a defense to section 1983 damage actions. The need for such an immunity has been characterized by the Supreme Court as an outgrowth of two concerns—the fear that officials will be deterred from exercising their discretion decisively or even elect not to seek office because of the threat of personal liability, and the possibility that public officers will unjustly be held liable for mistakes made in good faith and without fault.[133]

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128. Supreme Court v. Consumers Union of the United States, 446 U.S. 719, 731-32 (1980); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 402-06 (1979). The Circuits have split over whether local legislators possess absolute immunity. *Compare* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) *with* Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970).

129. Supreme Court v. Consumers Union of the United States, 446 U.S. 719, 735 (1980); Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). The Supreme Court has granted certiorari to determine whether judicial officials are immune from an award of attorneys' fees in § 1983 actions seeking declaratory and injunctive relief. Pulliam v. Allen, 51 U.S.L.W. 3770 (U.S. Apr. 25, 1983) (No. 82-1432).

Private parties who conspire with state judges to violate constitutional rights, although acting under color of state law for purposes of § 1983, do not share absolute judicial immunity. Dennis v. Sparks, 449 U.S. 24 (1980).

130. Imbler v. Pachtman, 424 U.S. 409 (1976). It is unclear whether a prosecutor is absolutely immune for actions taken as an administrator or investigative officer. *Id.* at 430-31; Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980) (prosecutor not absolutely immune from damages for participation in search and seizure and defamatory statements to media prior to indictment). Absolute prosecutorial immunity, however, is limited to damage actions and will not bar a § 1983 action seeking declaratory or injunctive relief. Supreme Court v. Consumers Union of the United States, 446 U.S. 719, 736-37 (1980).

131. Briscoe v. Lahue, 103 S. Ct. 1108 (1983).

132. *See* Stump v. Sparkman, 435 U.S. 349, 356 (1978).

133. *See* Scheuer v. Rhodes, 416 U.S. 232, 239-40 (1974). In cases seeking equitable

The United States Supreme Court first recognized the qualified immunity defense in *Pierson v. Ray*.[134] *Pierson* arose out of the efforts of fifteen white and black clergymen to use segregated facilities at a Jackson, Mississippi bus terminal in 1961. The clergymen were arrested for violating a Mississippi criminal statute that proscribed assemblies in public places and refusals to obey orders to disperse.[135] After one of the clergymen was acquitted and the charges against the others dropped, the clergymen sued the arresting officers for violation of their constitutional rights under section 1983 and for common law false arrest and false imprisonment.[136] During the course of the *Pierson* litigation, the Mississippi statute was declared unconstitutional in an unrelated action.[137]

After a jury returned a verdict in favor of the arresting officers, the court of appeals remanded for a new trial.[138] It held that although the police officers could successfully defend against the common law claim if they had probable cause to believe the statute had been violated, the officers would be liable under section 1983 for arresting the clergymen pursuant to an unconstitutional statute, even if they acted in good faith and with probable cause.[139] The Supreme Court reversed, holding that the common law defense of good faith and probable cause could be asserted in suits under section 1983.[140]

The Supreme Court elaborated upon this qualified immunity in *Scheuer v. Rhodes*,[141] a section 1983 action alleging that executive officials of the State of Ohio had unnecessarily deployed the Ohio National Guard to the campus of Kent State University and had ordered the Guard to take illegal actions that resulted in the deaths of several students.[142] The court of appeals affirmed dismissal of the complaint, in part because it believed the executive officials were ab-

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relief, where such concerns are not implicated, the qualified immunity may not be asserted. *See* Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975); Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974).

134. 386 U.S. 547 (1967).

135. *Id.* at 549.

136. *Id.* at 550.

137. Thomas v. Mississippi, 380 U.S. 524 (1965).

138. 352 F.2d 213, 221 (5th Cir. 1965), *rev'd*, 386 U.S. 547 (1967).

139. *Id.* at 218.

140. 386 U.S. at 557.

141. 416 U.S. 232 (1974). Named as defendants in *Scheuer* were the Governor, Adjutant General and his assistant, named and unnamed officers and enlisted members of the Ohio National Guard, and the president of Kent State University. *Id.* at 234.

142. *Id.* at 235.

solutely immune from suit.[143] The Supreme Court reversed and held that the executive officials were not entitled to absolute immunity.[144] However, the officials could invoke a qualified immunity, which the Court defined as follows:

> [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[145]

As defined by the *Scheuer* Court, the qualified immunity contains a subjective element, consisting of the official's good faith belief in the legality of his actions,[146] and an objective element, requiring reasonable grounds for that belief.[147] The language of *Scheuer* suggests that an official would have to establish both a subjective good faith belief and objectively reasonable grounds for the existence of that belief to avail himself of the qualified immunity.

Extending the qualified immunity to school board officials, the Supreme Court, in *Wood v. Strickland*,[148] made it clear that an official must satisfy both the subjective and objective elements to be shielded by the immunity. Though acting in good faith, the official will not be immune if he should have known his actions were improper. As the Court explained, state officials

> must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights. . . . That is not to say that school board members are "charged with predicting the future course of constitutional law." . . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[149]

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143. *Id.* at 234-35, 238.
144. *Id.* at 243.
145. *Id.* at 247-48.
146. *See id.* at 248.
147. *Id.* at 247-48.
148. 420 U.S. 308 (1975).
149. *Id.* at 322 (citation omitted) (quoting *Pierson*, 386 U.S. at 557).

The *Wood* standard was reiterated in *O'Connor v. Donaldson*[150] and in *Procunier v. Navarette*.[151] In *Procunier*, however, the Court implicitly abandoned the proposition that state actors would be charged with knowledge of "basic, unquestioned constitutional rights."[152] Instead, under the objective part of the test, the *Procunier* Court held that the immunity defense fails only if (1) the constitutional right violated was "clearly established" at the time of the alleged infringement, (2) the officer knew or should have known of that right, *and* (3) the officer knew or should have known that his conduct violated the constitutional standard.[153]

The Supreme Court continued its retreat from the *Wood* standard and further broadened the protection afforded by the immunity defense by abandoning altogether the subjective element in its most recent qualified immunity decision, *Harlow v. Fitzgerald*.[154] A. Ernest Fitzgerald, a former management analyst with the Department of the Air Force, alleged that he was discharged from his position with the Department in retaliation for his testimony before a congressional committee concerning technical difficulties and cost overruns on the C-5A transport plane. Fitzgerald sued, among others, President Richard Nixon and senior White House aides Bryce Harlow and Alexander Butterfield, alleging that they conspired to terminate his employment in violation of his first amendment and statutory rights.[155] Nixon, Harlow and Butterfield moved for summary judgment, asserting that they were entitled to absolute immunity. The district court denied the motions[156] and the court of appeals summarily dismissed Harlow and Butterfield's collateral appeal from the denial of the immunity defense.[157] The Supreme Court

150. 422 U.S. 563 (1975) (extending qualified immunity to hospital superintendent).

151. 434 U.S. 555 (1978) (prison officials have qualified immunity); *see infra* notes 190-92 and accompanying text.

152. *Wood*, 420 U.S. at 322.

153. 434 U.S. at 562.

154. 102 S. Ct. 2727 (1982).

155. *Id.* at 2730. Fitzgerald averred that his discharge violated both 5 U.S.C. § 7211 (Supp. III 1979), which provides, in pertinent part, that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied," *id.*, and 18 U.S.C. § 1505 (1976), which makes it a crime to obstruct congressional testimony. 102 S. Ct. 2732 & n.10. Neither statute expressly provides a private cause of action for damages; because the Court took jurisdiction only to decide the immunity issue, it declined to consider whether a damages action could be implied. *See id.* at 2732 n.10, 2740 n.36.

156. 102 S. Ct. at 2729.

157. President Nixon filed an independent appeal from the denial of the immunity defense. *See* Nixon v. Fitzgerald, 102 S. Ct. 2690 (1982); *infra* notes 357-74 and accompanying

granted certiorari to determine "the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts."[158]

The Supreme Court, rejecting Harlow and Butterfield's claim to absolute immunity, held that as a general rule, presidential aides are entitled only to a qualified immunity.[159] However, the Court accepted the petitioners' alternative argument that the existing qualified immunity standard should be adjusted to facilitate the dismissal of insubstantial claims prior to trial on the merits.[160] The purpose of the qualified immunity, the Court observed, is not only ultimately to shield government officials from liability, but also to terminate, before trial, lawsuits raising unmeritorious claims with their attending social costs.[161] Under the *Wood* standard, the Court opined, government officials have difficulty obtaining summary judgment based on the qualified immunity because courts often consider the issue of the official's subjective good faith as presenting a material question of fact inappropriate for resolution on a motion for summary judgment.[162] In addition, wide ranging discovery is frequently necessary to determine an official's subjective motivation, which further increases the disruption of governmental functions.[163] In order to allow insubstantial claims to be defeated without the burdens of discovery and trial, the Court eliminated the subjective tier of the qualified immunity. It held that, regardless of their belief or intent, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[164]

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text.

158. 102 S. Ct. at 2730, 2732.

159. *Id.* at 2734; *see infra* text accompanying notes 375-81.

160. 102 S. Ct. at 2736.

161. The Court stated:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

Id. (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

162. *See id.* at 2737-38.

163. *Id.* at 2738.

164. *Id.* The Court appears to have revived the common law distinction between immunity for functions that are discretionary and those that are ministerial. *See infra* note 200. While this distinction had not been adopted for purposes of immunity under § 1983, in

Having adopted the objective element as the sole test for the qualified immunity, the Court proceeded to explain how courts should apply the immunity to avoid discovery and expedite early resolution of frivolous claims:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.[165]

The Court then remanded the case to the district court to reconsider the motions for summary judgment.[166]

While *Harlow* represents the Supreme Court's latest exegesis of the qualified immunity, it is not clear that the holding properly extends to section 1983 actions. Because the *Harlow* defendants were federal officials, Fitzgerald's constitutional claim was brought as a *Bivens*[167] action[168] rather than under section 1983. Although acknowledging that the case did not squarely raise the issue of the scope of the qualified immunity afforded state officials, the Court suggested that its holding should apply to section 1983, when it asserted in a footnote that " 'it would be untenable to draw a distinction for purposes of immunity law between suits brought against

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Harlow, the Court, without citation, stated that "[i]mmunity generally is available only to officials performing discretionary functions." 102 S. Ct. at 2738.

165. *Id.* at 2739 (footnote omitted). Justice Brennan, in a concurring opinion joined by Justices Marshall and Blackmun, submitted that, under the majority's approach, a public official who actually knows that his conduct contravenes the Constitution will not be immune, even if a reasonable official would not necessarily have known the actions were unconstitutional. *Id.* at 2740 (Brennan, J., concurring). As a result, Justice Brennan opined, discovery may be necessary prior to summary judgment to determine an official's actual knowledge at the time of the alleged constitutional deprivation. *Id.* (Brennan, J., concurring).

166. *Id.* at 2739-40.

167. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

168. *See supra* note 3; *infra* notes 293-336 and accompanying text.

state officials under § 1983 and suits brought directly under the Constitution against federal officials.' "[169] The abrogation of the subjective element of the immunity in *Harlow*, however, was premised solely upon the Court's assessment of public policy. While this may be appropriate for *Bivens* actions, which are largely a creation of the judiciary,[170] the Court does not have the discretion to depart from the intent of the legislature and apply its own notions of policy to section 1983 actions.

As previously discussed, immunity to section 1983 liability is founded in Congress' presumed adoption of immunities that were established at common law.[171] Therefore, the parameters of the qualified immunity under section 1983 must be defined by reference to the common law. The Court has consistently held that to avail himself of the common law immunity incorporated into section 1983, a state official must establish both objective and subjective good

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169. 102 S. Ct. at 2739 n.30 (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)). *See infra* notes 348-56 and accompanying text.

The Fifth Circuit has consistently relied on this footnote, 102 S. Ct. at 2739 n.30, to hold the *Harlow* standard applicable to § 1983 actions. Trejo v. Perez, 693 F.2d 482, 484-85 n.4 (5th Cir. 1982); Brewer v. Blackwell, 692 F.2d 387, 399 n.16 (5th Cir. 1982); Saldana v. Garza, 684 F.2d 1159, 1164 n.16 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3534 (U.S. Jan. 4, 1983) (No. 82-1132). Other Courts have similarly employed a purely objective test for the qualified immunity in § 1983 actions without even questioning whether *Harlow* properly extends to such actions. *See* Green v. White, 693 F.2d 45, 47 (8th Cir. 1982); Williams v. Bennett, 689 F.2d 1370, 1385 (11th Cir. 1982); Crowder v. Lash, 687 F.2d 996, 1007 (7th Cir. 1982).

Four days after deciding *Harlow*, the Supreme Court granted the petition for certiorari in Sanborn v. Wolfel, 102 S. Ct. 3476 (1982), a damages action brought under § 1983. The Sixth Circuit had affirmed a jury verdict against two parole officers who were alleged to have improperly arrested and imprisoned the plaintiff without holding a preliminary hearing to determine probable cause. *See* Wolfel v. Sanborn, 666 F.2d 1005 (6th Cir. 1981). Without benefit of briefs or argument, the Supreme Court summarily issued the following order:

> The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Harlow v. Fitzgerald*, 457 U.S. ___, 102 S. Ct. 2727, 72 L.Ed.2d ___ (1982). See *Butz v. Economou*, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909, 57 L.Ed.2d 895 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under Sec. 1983 and suits brought directly under the Constitution against federal officials").

102 S. Ct. at 3476. The court of appeals construed the remand order to signify that the purely objective qualified immunity standard announced in *Harlow* was to be applied to actions brought under § 1983, and remanded the case to the district court to reconsider the officers' motion for summary judgment in light of *Harlow*. Wolfel v. Sanborn, 691 F.2d 270, 272 (6th Cir. 1982).

170. *See infra* notes 293-328 and accompanying text.

171. *See supra* notes 120-24 and accompanying text.

faith.[172] The judicial abolition of the subjective element of the immunity for *Bivens* actions accomplished in *Harlow* cannot and should not simply be extended to section 1983 actions.[173] Only Congress may properly determine whether public policy mandates amending section 1983 to create a purely objective standard for the immunity defense.

Resolution of this important policy question requires careful investigation into the extent to which insubstantial constitutional claims actually impose the social costs identified in *Harlow*. It is equally important to assess the degree to which abnegation of the subjective element of the immunity will undermine the deterrent effect of section 1983 and leave victims of intentional violations of constitutional rights without redress. The Supreme Court, in *Harlow*, cited no statistics or other evidence to justify its conclusion that the costs imposed by the subjective prong of the immunity outweigh the additional deterrence and compensation that flow from the requirement that public officials satisfy both the subjective and objective aspects of the immunity to avoid liability. Indeed, the Court's unsupported assertion that a purely objective immunity standard adequately vindicates the public interest in deterring constitutional violations and compensating victims of official misconduct[174] is, arguably, belied by its own construction of the objective standard.[175] Regardless of the merits of the Court's policy analysis, the appropriate forum for expanding the parameters of the qualified immunity under section 1983 is Congress and not the Supreme Court.

2. *The Standard of Fault under the Qualified Immunity.*—The qualified immunity, in essence, allows a state official to avoid liability where his actions, although unconstitutional, cannot be faulted. The subjective and objective prongs of the immunity introduce a separate element of culpability into the section 1983 cause of action. The subjective tier of the immunity, to the extent it remains applicable to section 1983 in the aftermath of *Harlow v. Fitzgerald*,[176] addresses the defendant's state of mind. The state official satisfies this aspect of the immunity if he did not intend to injure the

172. *See supra* notes 148-51 and accompanying text.

173. Judicial expansion of the immunity defense to § 1983 actions also contravenes the legislature's instruction to construe the statute broadly and liberally. *See supra* notes 108-13 and accompanying text.

174. 102 S. Ct. at 2739.

175. *See infra* notes 190-202 and accompanying text.

176. 102 S. Ct. 2727 (1982).

plaintiff. As the Supreme Court explained in *Procunier v. Navarette*,[177] the subjective prong

> would authorize liability where the official has acted with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." This part of the rule speaks of "intentional injury," contemplating that the actor intends the consequences of his conduct. See Restatement (Second) of Torts § 8A (1965).[178]

It is plain that negligent conduct, which does not implicate an intent to harm, lies within the protection afforded by the subjective prong of the immunity.[179] Some courts, however, hold the immunity unavailable where a state official, although not maliciously intending to inflict harm, acts with deliberate indifference to the plaintiff's constitutional rights or knows that the consequences of his action are substantially certain to occur.[180] This approach is consistent with analogous tort law, which treats reckless conduct as if it were intended.[181]

The objective prong of the qualified immunity, which also must be satisfied for the defense to apply, is not concerned with the intent of the state actor, but instead addresses the distinct question of the reasonableness of the official's conduct.[182] An understanding of the standard of culpability that issues from the objective part of the immunity, however, is clouded by the fact that the purposes underlying the immunity, as announced by the Supreme Court, are not mirrored by the test adopted by the Court.

As previously noted, the qualified immunity emerged to redress the twin concerns that (1) it is unjust to subject public officers to liability for mistakes made in good faith and without fault while carrying out their official functions, and that (2) the threat of personal liability will discourage government officials from acting decisively and independently or, more dramatically, will deter competent people from seeking public office.[183] The Supreme Court repeatedly described the immunity necessary to vindicate these concerns in tradi-

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177. 434 U.S. 555 (1978).

178. *Id.* at 566.

179. *See id.*

180. *See, e.g.*, Hughes v. Blankenship, 672 F.2d 403 (4th Cir. 1982); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979).

181. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34, at 188 (4th ed. 1971).

182. *See supra* text accompanying notes 148-53.

183. *See* Scheuer v. Rhodes, 416 U.S. at 232, 240 (1974).

tional negligence terms. In *Pierson v. Ray*,[184] the Court held that police officers would be excused from liability for acting under a statute that they had "reasonably believed to be valid."[185] The Court, in *Scheuer v. Rhodes*,[186] similarly concluded that the immunity would be available where there were "reasonable grounds for the belief [in the propriety of the officer's actions] formed at the time and in light of *all* the circumstances."[187] In *Wood v. Strickland*,[188] the Court again countenanced a negligence standard of liability for the objective prong of the qualified immunity:

> The imposition of monetary costs for mistakes *which were not unreasonable in the light of all the circumstances* would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interests of the school and the students.
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> . . . .
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> . . .[T]he immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and *within the bounds of reason under all the circumstances* will not be punished and that they need not exercise their discretion with undue timidity.[189]

The specific test for the objective tier developed by the Court, however, has subtly deviated from the negligence standard that it appeared to promote. Although not purporting to depart from its precedents, the Court in *Procunier*, as noted earlier, set forth the three-part test for the objective component of the immunity defense.[190] Instead of examining the reasonableness of the state official's conduct under all the circumstances, the standard articulated in *Procunier* focuses narrowly on the state of constitutional law and ignores other relevant factors that may render a state official's con-

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184. 386 U.S. 547 (1967).

185. *Id.* at 555. The RESTATEMENT (SECOND) OF TORTS § 11 (1966), defines the term "reasonably believes" "to denote the fact that the actor believes that a given fact or combination of facts exists, and that circumstances which he knows, or should know, are such as to cause a reasonable man so to believe."

186. 416 U.S. 232 (1974).

187. *Id.* at 247-48 (emphasis added).

188. 420 U.S. 308 (1975).

189. *Id.* at 319-21 (emphasis added). Several lower courts have similarly interpreted the objective tier of the qualified immunity as imposing a negligence standard. *See, e.g.*, Fowler v. Cross, 635 F.2d 476, 482 n.9 (5th Cir. 1981); Bryan v. Jones, 530 F.2d 1210, 1212-13 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976); Wright v. McMann, 460 F.2d 126, 135 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972).

190. *See supra* text accompanying note 153.

duct unreasonable.[191] Even where the federal constitutional law is unsettled, an official's actions may be unreasonable because they are contrary to training afforded the officer, violate instructions of a superior or departmental policy, or contravene state law. The official also may be negligent in light of specific facts within his knowledge, notwithstanding the state of the law. The *Procunier* test, nevertheless, would exonerate the officer as a matter of law solely because the constitutional right at issue was not clearly established at the time of the alleged deprivation.[192]

In *Harlow*, the Court not only affirmed the principle that a state official is immune whenever the constitutional right allegedly violated was not clearly established, but further instructed that the plaintiff should be denied discovery until the court determines the state of the law at the time of the purported constitutional invasion.[193] Thus, under *Harlow*, the plaintiff is entirely precluded from even discovering matters such as facts known by the defendant, internal policy, training, and instructions that could demonstrate that the officer's actions were unreasonable despite the unsettled state of the law.

Interestingly, the Court continues to advocate a general negligence standard when it works to the benefit of the state official. Although the plaintiff is not afforded an opportunity to defeat the immunity by discovering and offering evidence that the defendant acted unreasonably when the law is not clearly established, the state official is still permitted to avoid liability by demonstrating the reasonableness of his actions where the right violated was clearly established.[194] The inequity of such a system is manifest.

The objective standard articulated by the Court has been justifiably criticized.[195] First, the Court has not defined when a constitu-

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191. *See* Withers v. Levine, 615 F.2d 158, 163 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980) ("[T]he immunity question turns not upon the reasonableness or unreasonableness of the defendants' conduct, but upon whether they had reason to believe they were violating a constitutional right.").

192. *See* 434 U.S. at 565. In Williams v. Treen, 671 F.2d 892 (5th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3509 (U.S. Jan. 10, 1983) (No. 82-281), however, the court refused to hold prison officials immune for violating inmates' constitutional right to safe and sanitary prison conditions even though the right was not clearly established at the time of the violation. The court noted that conditions at the prison violated applicable *state* fire, safety, and health regulations and, therefore, held that the officials' belief in the lawfulness of those conditions was per se unreasonable. *Id.* at 898-900.

193. *See* 102 S. Ct. at 2739.

194. *See id.*

195. *See* Freed, *Executive Official Immunity for Constitutional Violations: An Analysis*

tional right becomes clearly established. Must there be a Supreme Court decision recognizing the right, or are federal district court and court of appeals opinions sufficient?[196] What if the federal district court and court of appeals governing the state in which the violation occurred have not previously had occasion to determine whether the official's conduct violates the constitutional norm; can the right be clearly established as a result of decisions of other federal courts?[197] Furthermore, is it sufficient that the relevant courts recognize the existence of the right generally, or must those courts determine that the specific conduct complained of contravenes the constitutional right before it becomes "clearly established"?[198] None of these important questions have been answered by the Supreme Court.

More fundamentally, rejection of a pure negligence standard in favor of a test that solely examines the state of constitutional law is not necessary to fulfill the underlying purposes of the qualified immunity. Certainly, it is not unjust to deny immunity to a public official who has acted unreasonably. Imposing liability for negligence in section 1983 actions simply applies accepted principles of fault and justice that govern common law actions against private individuals[199] as well as public officials.[200] Similarly, subjecting state officials to

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and a Critique, 72 NW. U.L. REV. 526, 557-59 (1977).

196. The Court, in *Procunier*, found that the first amendment rights claimed by the prisoners were not clearly established "[w]hether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court." 434 U.S. at 565. Thus, the Court had no cause to determine whether a right could be clearly established based solely on district court or court of appeals decisions. In *Harlow*, the Court again declined to address the issue. 102 S. Ct. at 2739 n.32.

197. In Raffone v. Robinson, 607 F.2d 1058 (2d Cir. 1979), the court refused to award damages for violation of a Connecticut state prisoner's due process rights, rejecting the plaintiff's contention that the right was clearly established because of a decision of a federal district court in the Northern District of California. The court reasoned: "[O]ne district court does not alone clearly establish a right. The defendants cannot . . . fairly be required, upon pain of money damages, to stay abreast of district court case law from across the country." *Id.* at 1062.

198. *Compare* Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) (prison official "cannot hide behind a claim that the particular factual predicate in question has never appeared *in haec verba* in a reported opinion.") *with* Withers v. Levine, 615 F.2d 158, 163 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980) (right not clearly established where previous decision only "defined the right in broad outline.").

199. *See* W. PROSSER, *supra* note 181, § 1, at 6.

200. The common law analog to the qualified immunity applicable to § 1983 actions does not shield public officials from liability for actions that are negligent. Under this common law immunity,

> the officer is not liable if his determination to take or not to take the action was reasonable. In a tort action against him, there is thus another issue of fact—the reasonableness of his decision, if he is acting in good faith. The trier of fact is not

liability for negligent acts will not unduly deter decisionmaking. The concern that official conduct should not be hampered by fear of liability must be balanced against the public's interest in encouraging public officials to weigh the propriety of their actions. This is especially true where constitutional rights are imperiled. Public policy neither demands nor desires wholly unfettered discretion for government officials. The public's interest in decisive but measured action by its government is best satisfied by holding a public official responsible when he fails to do what a reasonable person would do under the same or similar circumstances.

Affording immunity for unreasonable and unconstitutional conduct whenever the right violated is not clearly established works a serious injustice upon the person who suffers the deprivation.[201] It is important to remember that the immunity issue arises only after it has been determined that the plaintiff's constitutional right has been

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deciding whether he was right in his determination but whether he made a reasonable determination. . . . The standard of what a reasonably prudent person would do under like circumstances applies.

RESTATEMENT (SECOND) OF TORTS § 895D comment e (1977).

For purposes of determining common law official immunity, many courts draw a distinction between functions that are discretionary, and, therefore, require some exercise of judgment, planning, or policymaking, and actions that are merely ministerial, such as implementation or execution of policy. If the conduct giving rise to the cause of action is characterized as discretionary, the official is not liable for actions taken in good faith, even if negligent. *See* McGuire v. Amyx, 317 Mo. 1061, 297 S.W. 968 (1927) (health department physician not liable for negligent misdiagnosis); Tyrell v. Burke, 110 N.J.L. 225, 164 A. 586 (1933) (members of licensing board immune for negligent failure to issue license, absent malice). While a majority of courts do not extend the immunity to actions taken in bad faith, W. PROSSER, *supra* note 181, § 132, at 989, others immunize officials from liability for malicious conduct if it can be labeled discretionary. *See* Barr v. Matteo, 360 U.S. 564 (1959) (Acting Director of Rent Stabilization absolutely privileged from liability for defamatory press release, even if malicious); Sheridan v. Crisona, 14 N.Y.2d 108, 198 N.E.2d 359, 249 N.Y.S.2d 161 (1964) (borough president immune for malicious publication of defamatory information). In contrast, if the defendant is performing ministerial tasks, liability attaches if the official acted negligently, regardless of his good faith. Davis v. Knud-Hansen Memorial Hosp., 635 F.2d 179, 186 (3d Cir. 1980); Simon v. Heald, 359 A.2d 666 (Del. Super. Ct. 1976); Wright v. Shanahan, 149 N.Y. 495, 502, 44 N.E. 74, 75 (1896).

Because of the difficulty in delineating between functions that are discretionary and ministerial, some commentators and courts have advocated that immunity should exist whenever an officer acts in good faith and with due care in the exercise of his official duties. *See, e.g.*, W. PROSSER, *supra* note 181, § 132, at 991. The Supreme Court adopted this simpler immunity test for § 1983 actions. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975). The discretionary nature of the official's actions, while a factor in determining the reasonableness of his conduct, is no longer determinative of the immunity under § 1983. *See* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974). *But see supra* note 164.

201. If *Harlow* is extended to § 1983 actions, even malicious deprivations of constitutional rights will be immunized where the law is unsettled.

infringed. Immunizing a state official who has acted unreasonably generally places the risk of loss of negligent unconstitutional conduct on the least appropriate party—the victim.[202] Such a result would be especially pernicious in a jurisdiction that refused to hold a right to be clearly established unless it had been recognized in a prior case with identical or similar facts.

In sum, the standard of culpability developed by the Supreme Court strikes an improper balance between the competing interests of protecting state officials from liability and ensuring that they consider the lawfulness of their conduct before acting. The state of the law is admittedly one factor to weigh in determining whether an official acted reasonably. The Court erred, however, by making it conclusive. If an official is found to have acted unreasonably after taking into account all the circumstances, including the status of the constitutional right violated, he should not be relieved of liability.

3. *Burden of Proving the Qualified Immunity.*—The Supreme Court, in *Gomez v. Toledo*,[203] resolved that the qualified immunity is an affirmative defense that must be pleaded by the defendant.[204] The Court emphasized that neither the language nor the legislative history of section 1983 suggests that the plaintiff is required to allege anything beyond a constitutional deprivation caused by a person acting under color of state law, in order to state a claim for relief.[205] Assigning the burden of pleading the immunity to the defendant, the Court reasoned, is also consistent with the general treatment of affirmative defenses in the federal system.[206] The *Gomez* Court further

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202. The risk of loss from negligent conduct is shifted to the government entity only where a municipal official violates the Constitution while acting pursuant to a policy or custom of the municipality. *See supra* notes 27-39 and accompanying text.

A tort remedy against the individual officer will not be adequate to redress injury to constitutional rights. Congress, in enacting § 1983, recognized that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

203. 446 U.S. 635 (1980).

204. *Id.* at 640.

205. *Id.* at 639-40; *see supra* notes 99-113 and accompanying text.

206. *See* 446 U.S. at 640 (citing FED. R. CIV. P. 8(c); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1969)). Wright and Miller note that Rule 8(c) is a "lineal descendent of the common law plea in 'confession and avoidance,' which permitted a defendant who was willing to admit that plaintiff's declaration demonstrated a prima facie case to then go on and allege additional new material that would defeat plaintiff's otherwise valid cause of action." 5 C. WRIGHT & A. MILLER, *supra*, § 1270, at 289 (footnote omitted).

The defense of qualified immunity is not specifically mentioned in the Federal Rules of

noted that the defendant's superior knowledge of facts relevant to establishing the defense mandates that the defendant bear the burden of pleading the qualified immunity:

> [W]hether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant. . . . The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether "[t]he official himself [is] acting sincerely and with a belief that he is doing right." There may be no way for a plaintiff to know in advance whether the official has such a belief or, indeed, whether he will even claim that he does. The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know. For example, the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware. To impose the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law.[207]

Because *Gomez* reached the Court following dismissal of the plaintiff's complaint for failure to allege bad faith,[208] the Supreme

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Civil Procedure. However, exemption from statutory coverage has been held to be an affirmative defense pursuant to Rule 8(c) in nondiversity cases. *See, e.g.*, Schmidtke v. Conesa, 141 F.2d 634, 635 (1st Cir. 1944) (Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980), is remedial and, therefore, its exceptions are to be strictly construed and are matters that must be alleged as special defenses under Rule 8(c)); Philip Morris, Inc. v. Imperial Tobacco Co., 251 F. Supp. 362, 379 (E.D. Va. 1965), *aff'd*, 401 F.2d 179 (1968), *cert. denied*, 393 U.S. 1094 (1969) (burden of establishing defense that falls within one of exceptions mentioned in Lanham Trademark Act, 15 U.S.C. § 1115(b) (1976), is upon defendant and must be pleaded affirmatively).

The closely related defense of privilege has also been held to be an affirmative defense pursuant to the Federal Rules. White v. Chicago, B. & Q.R.R., 417 F.2d 941 (8th Cir. 1969). In *White*, a slander action, the court stated: "The defense of qualified privilege constitutes an avoidance of the claim and as such is required to be pleaded as an affirmative defense under Rule 8(c)." *Id.* at 946.

207. 446 U.S. at 641 (citation omitted) (footnote omitted). The "analogous areas of the law" that the Court cited were: stockholder's derivative suits (discussed in Cohen v. Ayers, 596 F.2d 733, 739-40 (7th Cir. 1979)); the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1976) (discussed in F.T.C. v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945)); the Internal Revenue Code, 26 U.S.C. § 6651(a)(1) (1976) (discussed in United States v. Kroll, 547 F.2d 393 (7th Cir. 1977)); the Fair Labor Standards Act, 29 U.S.C. § 260 (1976) (discussed in Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468 (5th Cir. 1979)). *See* 446 U.S. at 641 n.8. In each of these areas, the burden of pleading the good faith defense rests with the defendant.

208. *See* 446 U.S. at 637-38. Justice Rehnquist joined the opinion of the Court with the express understanding that it left open the burden of proof issue. *Id.* at 642 (Rehnquist, J., concurring).

Court had no direct cause to address the burden of proving the qualified immunity. In subsequent cases, however, the Court placed the burden of establishing an analogous immunity under section 1983—the absolute immunity—on the state official. In *Dennis v. Sparks*,[209] private persons, sued under section 1983 for allegedly conspiring with a state court judge to violate the plaintiff's constitutional rights, claimed that they shared the judge's absolute immunity.[210] The Court commenced its analysis of the immunity question by noting that "the burden is on the official claiming immunity to demonstrate his entitlement."[211] In *Harlow v. Fitzgerald*,[212] the Court again assigned the burden of proving the immunity to the defendant officials.[213] While *Dennis* and *Harlow* concern the burden of establishing an absolute immunity, no different allocation of the burden of proving a qualified immunity is warranted. Indeed, as a vast majority of the lower federal courts have decided, the reasons set forth in *Gomez* for requiring the defendant to plead the qualified immunity equally dictate that he should bear the burden of proving the immunity.[214]

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209. 449 U.S. 24 (1980).

210. *Id.* at 26.

211. *Id.* at 29 (footnote omitted). The Court found that the private defendants failed to meet their burden and were not entitled to immunity.

212. 102 S. Ct. 2727 (1982).

213. *Id.* at 2735-36.

214. The following courts place the burden of proving the qualified immunity on the defendant. FIRST CIRCUIT: DeVasto v. Faherty, 658 F.2d 859, 865 (1st Cir. 1981). SECOND CIRCUIT: Laverne v. Corning, 376 F. Supp. 836 (S.D.N.Y. 1974), *aff'd*, 522 F.2d 1144 (2d Cir. 1975). THIRD CIRCUIT: Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979 (1976). FOURTH CIRCUIT: Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1435 (1982); McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972) (dicta). SIXTH CIRCUIT: Haislah v. Walton, 676 F.2d 208, 214-15 (6th Cir. 1982); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); Jones v. Perrigan, 459 F.2d 81, 83 (6th Cir. 1972). SEVENTH CIRCUIT: Chavis v. Rowe, 643 F.2d 1281, 1288 (7th Cir.), *cert. denied*, 454 U.S. 907 (1981). *Contra* Whitey v. Seibel, 613 F.2d 682, 685 (7th Cir. 1980), *cert. denied*, 103 S. Ct. 254 (1982). EIGHTH CIRCUIT: Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978); McLallen v. Henderson, 492 F.2d 1298, 1300 (8th Cir. 1974). NINTH CIRCUIT: Harris v. City of Roseburg, 664 F.2d 1121, 1129 (9th Cir. 1981). TENTH CIRCUIT: Hendriksen v. Bentley, 644 F.2d 852, 856 (10th Cir. 1981). D.C. CIRCUIT: Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978).

The Fifth Circuit also places the burden of proving the qualified immunity on the defendant. Taylor v. Carlson, 671 F.2d 137 (5th Cir. 1982); Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981); Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980). However, the showing necessary to meet the burden in that circuit varies with the degree of discretion exercised by the state official. Where the state official exercises broad discretion, he need only prove that he was

Because the language and legislative history of section 1983 make no reference to a qualified immunity, they obviously do not designate which party has the burden of proving or disproving the immunity. The Court in *Gomez* relied upon this legislative silence, together with the congressional instruction to broadly and liberally construe section 1983, to hold that the plaintiff does not bear the burden of pleading that the qualified immunity is unavailable.[215] Under the same reasoning, it follows that the plaintiff also does not bear the burden of disproving the qualified immunity defense to prevail in an action under section 1983.

Requiring the defendant to prove the elements of the qualified immunity is also consistent with the common law allocation of the burden of proving affirmative defenses. As a general evidentiary rule in civil cases, the party who bears the burden of pleading will also bear the burden of proof with respect to matters averred.[216] Affirmative defenses, such as immunities, are no exception to this basic principle. Indeed, many courts assign the defendant the burden of proving the qualified immunity precisely because, as the *Gomez* decision emphasized, the immunity is an affirmative defense.[217] Thus, the general common law rule[218] and current federal practice, which the *Gomez* court examined in determining the allocation of the burden of pleading the qualified immunity,[219] similarly require the defendant to prove the immunity.

The nature of the qualified immunity likewise dictates that the defendant be required to prove, as well as plead, the defense. The

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acting within the scope of his discretion, in which case the burden shifts to the plaintiff to show that the official intended to harm the plaintiff or knew or should have known that his conduct violated the plaintiff's clearly established constitutional rights. *Id.* at 534. Where the official exercises little discretion, he bears the burden of proving subjective and objective good faith. *Id.*

215. *See Gomez*, 446 U.S. at 639-40.

216. "In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well." C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 785 (1972).

217. *See, e.g.*, Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978) ("[L]ike other affirmative defenses originally predicated on the common law, the burden is on the defendant to prove each element of the [qualified immunity] defense to the jury's satisfaction."); McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); Green v. James, 473 F.2d 660, 661 (9th Cir. 1973).

218. *See* Sowle, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for its Use and the Burden of Persuasion*, 55 TUL. L. REV. 326, 393-417 (1981) (by analogy to common law tort actions, defendant officials should bear burden of proving qualified immunity in § 1983 actions).

219. *See Gomez*, 446 U.S. at 640.

Supreme Court held that the defendant must plead the good faith defense because it "depends on facts peculiarly within the knowledge and control of the defendant."[220] Most courts similarly impose the burden of proof on a party where the facts with regard to an issue lie uniquely within the knowledge of that party.[221] Although it may be argued that liberal pretrial discovery under the Federal Rules of Civil Procedure has changed this common law doctrine, Professor McCormick has observed that "there has been no rush by the courts to reassess allocations between the parties in the light of expanded discovery."[222]

Finally, the burden of proving, as well as the burden of pleading, the good faith defense is imposed on the defendant in the "analogous areas of the law" examined by the *Gomez* court.[223] The defendant must both plead and prove good faith pursuant to the Fair Labor Standards Act,[224] the Robinson-Patman Act[225] and the Internal Revenue Code.[226] Similarly, in stockholder's derivative suits, a defendant must assert and prove the defense of good faith.[227] No reason exists to adopt a different allocation of the burden of proving the qualified immunity in actions under section 1983.

4. *The Interrelationship Between the Qualified Immunity and the Plaintiff's Prima Facie Case.*—The continued vitality of the qualified immunity confirms that section 1983 should be read to require that a plaintiff prove only a constitutional violation caused by a person acting under color of state law. The immunity defense presupposes that the plaintiff is not required to establish the state actor's culpability; the official is exonerated only if he proves subjective good faith and the reasonableness of his conduct.

The Supreme Court has never squarely addressed the interrelationship in a section 1983 case between the qualified immunity and the elements of the plaintiff's prima facie case. Nevertheless, in crafting the qualified immunity, the Court implicitly acknowledged that the plaintiff is not required to prove the defendant's culpability

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220. *Id.* at 641.

221. C. MCCORMICK, *supra* note 216, at 787.

222. *Id.* at 787 n.19.

223. 446 U.S. at 641 & n.8.

224. Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468 (5th Cir. 1979).

225. F.T.C. v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945).

226. United States v. Kroll, 547 F.2d 393, 395 (7th Cir. 1977) (to avoid penalty, taxpayer filing late must show that failure to timely file was due to reasonable cause and not willful neglect).

227. Cohen v. Ayers, 596 F.2d 733, 739-40 (7th Cir. 1979).

beyond establishing a constitutional deprivation inflicted under color of state law. In fact, the qualified immunity defense, as first recognized in *Pierson v. Ray*,[228] arose out of an unwillingness to hold police officers liable for actions that, albeit unconstitutional, were reasonable when taken. Nowhere in *Pierson* did the Court specify that the plaintiff, to establish a prima facie case, would be required to prove that the defendants acted negligently. On the contrary, the Court assumed that absent a qualified immunity, the officers unfairly would be held strictly liable.[229] Thus, the Court, in describing the need for an immunity, stated: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[230] The Supreme Court again recognized that it is the qualified immunity that allows a defendant in a section 1983 action to avoid strict liability for constitutional violations when, in *Owen v. City of Independence*,[231] it held that municipalities are not entitled to immunity.[232] The Court expressly observed that absent the immunity, a municipality will be held liable for constitutional violations even if its officers acted reasonably:

> [A] municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.[233]

Surprisingly, only a handful of lower federal courts have explored the interplay between the elements of a plaintiff's cause of action in a section 1983 case and the qualified immunity defense. Two of these courts agree that the plaintiff need not prove the defendant's culpability because the qualified immunity affords the defendant an opportunity to prevail by proving freedom from fault. In

228. 386 U.S. 547 (1967).
229. *Id.* at 555.
230. *See id.*
231. 445 U.S. 622 (1980).
232. *Id.* at 657.
233. *Id.* at 649. Justice Powell, in a dissenting opinion joined by Chief Justice Burger, Justice Stewart and Justice Rehnquist, acknowledged that as a result of the Court's holding, municipalities will be held strictly liable for constitutional violations under § 1983. *Id.* at 665 (Powell, J., dissenting).

Bryan v. Jones,[234] the Fifth Circuit held that a plaintiff in a section 1983 action arising out of false imprisonment is not required to prove negligence of the jailer as a part of his prima facie case.[235] Instead, the court found, the reasonableness of the defendant's conduct is an element of the qualified immunity defense.[236] The court then defined the immunity in traditional negligence terms:

> In a case such as this one, where there is no discretion and relatively little time pressure, the jailer will be held to a high level of reasonableness as to his own actions. If he *negligently* establishes a record keeping system in which errors of this kind are likely, he will be held liable. But if the errors take place outside of his realm of responsibility, he cannot be found liable because he had acted *reasonably* and in good faith.[237]

In *Street v. Surdyka*,[238] the trial judge instructed the jury that a plaintiff in a section 1983 action must prove not only false arrest in violation of his constitutional rights, but also that the arresting officer acted intentionally or recklessly. The Fourth Circuit held that the trial court's instruction requiring the plaintiff to prove culpability was erroneous because it duplicated the defendant's burden of proving the qualified immunity:

> We doubt that this independent state of mind requirement is appropriate in a suit based on unconstitutional arrest. . . . [O]fficers may defend such actions by showing good faith and reasonable belief in the validity of the arrest. . . . This defense, though conceptually different from an independent requirement of intent, serves essentially the same function. Both measure the defendant's state of mind. And in arrest cases, both standards guard against the chance that a policeman will suffer liability for a good-faith mistake in applying the technical rules of probable cause.[239]

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234. 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976).

235. *Id.* at 1213.

236. *Bryan* overruled the Fifth Circuit's earlier holding in Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968), *cert. denied*, 396 U.S. 901 (1969), that no qualified immunity is available in a § 1983 action alleging false imprisonment.

237. *Bryan*, 530 F.2d at 1215 (emphasis added). Judge Wisdom, concurring in part and dissenting in part, agreed that the good faith defense would not shield the defendant from liability for negligent conduct. *See id.* at 1218 (Wisdom, J., concurring in part and dissenting in part); *see also* DeVasto v. Faherty, 658 F.2d 859, 865 (1st Cir. 1981); Patzig v. O'Neil, 577 F.2d 841, 849-50 n.9 (3d Cir. 1978); McCollan v. Tate, 575 F.2d 509 (5th Cir. 1978), *rev'd sub nom.* Baker v. McCollan, 443 U.S. 137 (1979); Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977).

238. 492 F.2d 368 (4th Cir. 1974).

239. *Id.* at 374 (citation omitted). The court found that the instruction, although incor-

At least one court, however, has continued to require the plaintiff to prove the culpability of the defendant while at the same time allowing the defendant to raise a qualified immunity defense. In *Beard v. Mitchell*,[240] Beard's estate brought a *Bivens* action[241] against Mitchell, a Special Agent of the Federal Bureau of Investigation, alleging that Mitchell's improper training and use of an informant was a proximate cause of Beard's death.[242] The trial judge instructed the jury that the plaintiff-estate had the burden of proving that the "personal acts of Mr. Mitchell were done either intentionally or with a reckless disregard."[243] The judge further instructed that even if the jury found that Mitchell had acted recklessly, they should find him not liable if he could prove that he "was acting in the good faith belief that his acts were proper and that belief was reasonable under the circumstances."[244]

On appeal from a jury verdict in favor of the defendant, the plaintiff-estate complained that the trial judge erred by requiring it to prove that Mitchell acted recklessly, averring that the reasonableness of the defendant's conduct is a component of his good faith defense.[245] The Seventh Circuit found that the trial court's instruction was proper and maintained that the qualified immunity concerns the reasonableness of the officer's belief, not the reasonableness of his conduct:

> This instruction does not duplicate the plaintiff's burden of proving unreasonable conduct. Mitchell was entitled to prove that his *belief* in the legality of his acts was reasonable but was not required to prove that his *conduct* was reasonable. The questions are distinct. For example, if the jury members had determined that it was grossly unreasonable for Mitchell to use a criminal informant, they still could have exonerated him if they found that he was merely acting in accordance with F.B.I. guidelines in the reasonable belief that such conduct would thereby be lawful.[246]

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rect, was not reversible error because the trial judge submitted a proper instruction on the good faith defense. *Id.*

240. 604 F.2d 485 (7th Cir. 1979).

241. Although *Beard* was brought as an action under *Bivens*, and not as a § 1983 action, the court applied the same standards that govern actions under § 1983. *See infra* notes 341-47 and accompanying text.

242. 604 F.2d at 489.

243. *Id.* at 493.

244. *Id.* at 495.

245. *See id.* at 493.

246. *Id.* at 496 (footnote omitted). The court also rejected the plaintiff's alternative argument that even if it was required to prove culpability, negligence and not recklessness was

The court then held that the jury could have found that Mitchell reasonably believed his use of the informant was proper because of F.B.I. procedures and policies encouraging the use of criminal informants.[247]

The Seventh Circuit's attempt to distinguish the qualified immunity is illogical and unfounded. It is difficult to discern any situation where it would be reasonable for an official to believe his conduct was proper yet unreasonable to act on that belief. If the jury found that a reasonable person in Mitchell's situation would believe that F.B.I. guidelines authorized his use of an informant, how could the jury then decide that it would be unreasonable for him to act in accordance with those same guidelines? The jury will surely consider the same factors to determine the reasonableness of his belief and the reasonableness of his conduct. Furthermore, the Supreme Court's qualified immunity decisions have never purported to distinguish between the defendant's belief and conduct. Justice Stevens aptly summarized the nature of the immunity in his dissenting opinion in *Procunier v. Navarette*,[248] when he stated: "The heart of the good-faith defense is the manner in which the defendant has carried out his job."[249]

If the plaintiff in a section 1983 action was required to prove the state official's negligence, yet the official was permitted to escape liability by proving the qualified immunity, both parties would bear the burden of proof on the same issue—the reasonableness of the official's conduct.[250] No purpose would be served save to increase the

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the appropriate standard. *See id.* at 494. The continued vitality of this aspect of the court of appeals' decision is questionable in light of the Supreme Court's subsequent decision in Parratt v. Taylor, 451 U.S. 527 (1981). *See* Bonner v. Coughlin, 657 F.2d 931, 933 n.3 (7th Cir. 1981) ("The Supreme Court . . . opinion in *Parratt v. Taylor* . . . now apparently would allow a § 1983 claim based upon a negligent deprivation of property. . . . ") (citation omitted).

247. *Beard*, 604 F.2d at 496.

248. 434 U.S. 555, 568 (1978) (Stevens, J., dissenting).

249. *Id.* at 570 (Stevens, J., dissenting) (footnote omitted); *accord* Wood v. Strickland, 420 U.S. 308 (1975). The *Wood* Court stated: "[T]he immunity must be such that public school officials understand that *action* taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished. . . ." *Id.* at 321 (emphasis added).

250. Gullatte v. Potts, 654 F.2d 1007, 1015 (5th Cir. 1981) ("[T]he evidence the plaintiff must produce to establish his *prima facie* case is precisely the type of evidence that makes the defendant's entitlement to the qualified immunity defense less likely. . . . The party to prevail is the one whose evidence the trier of fact believes is more probable than not."). *See* Sowle, *supra* note 218, at 344-45 (because objective tier of qualified immunity raises issue of whether defendant was negligent, defense should not be available in action for negligent depri-

risk that the jury will be confused and, thus, arrive at an erroneous verdict. Under such an allocation, the jury unnecessarily is given two opportunities to acquit the defendant official by finding that he acted reasonably: First, when it considers whether the plaintiff established that the state official acted negligently, and second, when it deliberates on whether the official proved the objective prong of the qualified immunity. This risk of error is readily avoided by recognizing that section 1983 does not require the plaintiff to prove negligence to prevail.

Even if the objective element of the qualified immunity is interpreted as addressing only the state official's knowledge that his conduct violated the Constitution,[251] a requirement that the plaintiff establish the defendant's negligence cannot be reconciled with the immunity defense. Admittedly, a state official will not have to prove that he acted reasonably to satisfy this standard. As a practical matter, however, the jury will not be able to appreciate the subtle distinction between the question of whether the defendant was negligent and the narrower issue of whether the defendant knew or should have known that his actions violated the Constitution.[252] The distinction is further blurred by the fact that the same evidence will be relevant to both issues. In order to determine whether the official had reason to know that his actions were unconstitutional, the jury will consider evidence concerning the state of the law, training, departmental regulations and guidelines, and consultations with other officers. This same evidence will be apposite to the jury's deliberations on whether the plaintiff proved that the official acted negligently.[253] Thus, even under the more limited definition of the quali-

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vations of constitutional rights under § 1983).

251. *See supra* notes 190-93 and accompanying text.

252. Under *Procunier* and *Harlow*, the latter issue arises only if the right violated was clearly established. 434 U.S. at 562; 102 S. Ct. at 2739; *see supra* 190-93 and accompanying text.

253. To ensure a proper verdict, the jury would have to be given an instruction similar to the following:

> Ladies and gentlemen of the jury, the plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant did not act as a reasonable person would have acted under the circumstances. In determining whether the plaintiff has met his burden, you should consider all the evidence, including evidence of whether the defendant knew or should have known that his actions violated the Constitution.
>
> If you find that the plaintiff has proved that the defendant acted unreasonably, you should then consider whether the defendant proved the defense of qualified immunity. You should find the defendant not liable if the defendant proved, by a preponderance of the evidence, that he did not know and that a reasonable person in his position would not have known, that his actions were unconstitutional. In deter-

fied immunity, requiring plaintiff to prove negligence would unnecessarily and improperly afford the jury two opportunities to exonerate the defendant under the same evidence.

In sum, analysis of the qualified immunity defense leads to precisely the same conclusion that emerged from scrutiny of the language and legislative history of section 1983 and Supreme Court cases construing the elements of a plaintiff's prima facie case:[254] The plaintiff must prove only two elements to state a claim for relief under section 1983—that he has been deprived of a constitutional right, and that the deprivation was caused by a person acting under color of state law.

D. *Standard of Culpability Imposed by the Constitution*

A third possible source of a culpability requirement in section 1983[255] actions is the United States Constitution. As the Supreme Court acknowledged in *Baker v. McCollan*,[256]

> the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place, quite apart from the issue of whether § 1983 contains some additional qualification of that nature before a defendant may be held to respond in damages under its provisions.[257]

Generally, however, the question of whether the Constitution has been violated does not depend upon the intent of the defendant or the reasonableness of his conduct. Instead, the inquiry focuses upon whether the official's actions comport with a legal standard that is established by evolving case law. This is best exemplified by the fourth amendment, which proscribes "unreasonable searches and seizures."[258] On its face, the amendment appears to create a negligence standard; yet, the factual question of the reasonableness of an officer's conduct is irrelevant to whether the fourth amendment has been violated. Rather, in order to determine whether a search or

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> mining whether the defendant has met his burden, you should only consider evidence concerning whether the defendant knew or should have known that his actions violated the Constitution.

While such an instruction possibly could be understood by a person trained in the law and familiar with the contours of the qualified immunity defense, it is unlikely that any juror would comprehend and properly apply the instruction.

254. *See supra* notes 60-119 and accompanying text.

255. 42 U.S.C. § 1983 (Supp. IV 1980).

256. 443 U.S. 137 (1979).

257. *Id.* at 140 n.1.

258. U.S. CONST. amend. IV.

seizure is unreasonable for fourth amendment purposes, the courts apply the legal test of probable cause as defined by judicial decisions.[259] The distinction between the constitutional standard of reasonableness under the fourth amendment and the tort standard of reasonableness governing the objective tier of the qualified immunity defense was recognized by Judge Lumbard in his concurring opinion on remand in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*:[260]

> [T]he agent has a complete defense if he can convince the trier of fact that he acted in good faith and that it was reasonable for him to have believed that the arrest and search were lawful. Thus there are two standards to be considered. The first is what constitutes reasonableness for purposes of defining probable cause under the fourth amendment for the protection of citizens against governmental overreaching. The other standard is the less stringent reasonable man standard of the tort action against government agents.[261]

Where the intent or reasonableness of the state actor's conduct is inapposite to the constitutional norm, the requirement that the plaintiff prove a deprivation of constitutional rights affects neither the standard of culpability nor the burden of proving or disproving culpability in section 1983 actions.[262] To establish a section 1983 claim, a plaintiff need only demonstrate that the violation of his constitutional rights was caused by a person acting under color of state law. The defendant can then avoid liability through the qualified immunity, when available, by proving that he acted reasonably and in good faith.

Although the intent or reasonableness of the government official's conduct, as a general rule, is immaterial to whether the Constitution has been violated, certain constitutional provisions are contravened only where the officer acted recklessly or with an intent to

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259. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85 (1979) (officer's reasonable belief that patron of bar was concealing narcotics does not justify warrantless search).

260. 456 F.2d 1339 (2d Cir. 1972).

261. *Id.* at 1348-49 (Lumbard, J., concurring). There is one situation where the reasonableness of a police officer's belief is germane to the constitutionality of a search or seizure. A warrantless patdown for weapons for the officer's own protection is justified if the officer reasonably believes that weapons are in the possession of a person he has detained. Terry v. Ohio, 392 U.S. 1 (1968).

262. The term "culpability," as throughout the article, is used here to narrowly address the intent or reasonableness of the defendant's actions. *See supra* note 4. The Constitution sets forth proscriptions on government conduct, violations of which are, of course, culpable.

deprive the plaintiff of constitutional rights. For example, the Supreme Court has required proof of "purposeful discrimination" to establish a violation of the equal protection clause of the fourteenth amendment.[263] Thus, unless the plaintiff proves that the defendant acted with a discriminatory purpose, a court will go no further in scrutinizing the alleged discrimination.[264]

Proof of intent also may be necessary to demonstrate a violation of the right to effective assistance of counsel guaranteed by the sixth and fourteenth amendments. In *Weatherford v. Bursey*,[265] the Supreme Court held that the mere presence of an undercover agent at meetings between a criminal defendant and his attorney did not deprive the accused of his constitutional right to effective assistance of counsel. The Court's decision rested largely on the fact that the agent did not purposefully and intentionally intrude into the attorney-client relationship to learn of the defense plans, but attended the meetings only in order to protect his cover.[266] The holding was also premised upon the fact that the agent neither disclosed the substance of the communications to his superior or the prosecutor nor referred to the meetings in his trial testimony.[267] Thus, it is unclear whether proof of intent would be necessary to establish a constitutional violation where such disclosure has been made.[268]

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263. Mobile v. Bolden, 446 U.S. 55, 66 (1980) ("the basic principle [is] that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment"); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The Court held in each of these cases that the fact of discriminatory impact, while evidence of discriminatory purpose, was alone not sufficient to establish a constitutional violation.

264. In some circumstances, the plaintiff's burden of proving purposeful discrimination is relaxed. Rather than requiring the plaintiff to affirmatively demonstrate the defendant's intent to discriminate, the purposefulness of the discrimination may be presumed. Purposeful discrimination will be presumed where a plaintiff alleging unlawful school segregation demonstrates a history of racial segregation in the school district, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971); where the law in question is facially discriminatory, Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."); and in cases in which a law is administered in a discriminatory fashion, Yick Wo v. Hopkins, 118 U.S. 356 (1886).

265. 429 U.S. 545 (1977).

266. *Id.* at 557.

267. *See* Briggs v. Goodwin, 698 F.2d 486 (D.C. Cir. 1983) (*Bivens* action may be maintained where government informant attended meetings between defendant and counsel and reported information acquired to FBI).

268. 429 U.S. at 554. *Cf.* Brown v. Schiff, 614 F.2d 237 (10th Cir.) (per curiam), *cert. denied*, 446 U.S. 941 (1980) (negligence of attorney appointed to represent criminal defendant insufficient to establish violation of sixth amendment right to counsel).

As a general rule, the culpability of the defendant is irrelevant to whether the first amendment has been violated.[269] However, the intent of the defendant is determinative in cases averring unconstitutional termination of employment because of the exercise of first amendment rights. In *Mount Healthy City School District Board of Education v. Doyle*,[270] an untenured teacher alleged that he was not rehired because he had engaged in activities protected by the first amendment. The Supreme Court held that in order to establish a violation of his first amendment rights, the teacher must "show that his conduct was constitutionally protected and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him."[271] Absent proof of such motive, there is no violation of the first amendment.[272]

The culpability of the defendant's conduct is also germane to whether a failure to provide a prisoner proper medical care violates the eighth amendment proscription against cruel and unusual punishment. In *Estelle v. Gamble*,[273] the Supreme Court held that proof of negligence in administering medical care to a prisoner was insufficient to state a claim for violation of the eighth amendment. In order to prevail, the plaintiff must demonstrate the prison officials' "delib-

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269. In order to determine whether government conduct violates the first amendment, courts balance the hardship placed upon the protected first amendment right against the asserted governmental interest. The intent of the government is generally irrelevant. For example, in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), the State of Alabama sought to compel the NAACP to produce its membership list as a condition of incorporation. When the NAACP refused on the ground that such a requirement offended its first amendment right to association, the Alabama Supreme Court held the organization in contempt. The United States Supreme Court reversed, rejecting the notion that the subjective motivation of the government had any relevance to the first amendment issue:

> The fact that Alabama. . .has taken no direct action to restrict the right of petitioner's members to associate freely, does not end inquiry into the *effect* of the production order. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action.

Id. at 461 (citations omitted) (emphasis added).

270. 429 U.S. 274 (1977).

271. *Id.* at 287 (footnote omitted).

272. The court went on to note that once the plaintiff demonstrates that his first amendment activities were a motivating factor in the school board's decision not to renew his contract, the burden shifts to the board to prove that the termination would have occurred even in the absence of conduct protected by the first amendment. *Id.; see also* Nekolny v. Painter, 653 F.2d 1164, 1168 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (plaintiff need not prove that conduct protected by first amendment was sole reason for termination).

273. 429 U.S. 97 (1976).

erate indifference to serious medical needs."[274] It is unclear, however, whether the "deliberate indifference" standard applies to other eighth amendment claims.[275]

The substantive provisions of the due process clause of the fifth and fourteenth amendments set forth legal standards that appear unrelated to the culpability of the government official.[276] In *Rochin v. California*,[277] the Supreme Court held that the due process clause of the fourteenth amendment preserves certain fundamental rights against government conduct that "shocks the conscience," offends "a sense of justice," or fails to "respect certain decencies of civilized conduct."[278] Although these standards are facially objective, several lower federal courts have interpreted *Rochin* as requiring proof of intent, recklessness, or deliberate indifference, to establish a violation of substantive rights guaranteed by the due process clause.[279] In *Baker v. McCollan*,[280] the Supreme Court also suggested that the due process clause requires proof of some degree of culpability on the part of the defendant. Although holding that the sheriff's negligent detention of the defendant did not offend due process, the Court

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274. *Id.* at 106. Justice Stevens criticized this standard in his dissent:

> I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate against a particular defendant. However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.

Id. at 116 (Stevens, J., dissenting) (footnotes omitted).

275. *See* Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533 (1978). *Compare* Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974) (evil intent, recklessness or deliberate indifference necessary to state eighth amendment violation for failure to protect prisoner) *with* Withers v. Levine, 615 F.2d 158, 162 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); Parker v. McKeithen, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974) (negligent failure to protect prisoner from unreasonable risk of harm from other prisoners may violate eighth amendment).

276. Certainly, the privacy rights founded in the due process clause do not depend on the intent of the government actor. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976) (state statute requiring unmarried minor to obtain parental consent for abortion invalid absent "significant state interest"); Griswold v. Connecticut, 381 U.S. 479 (1965) (state statute forbidding use of contraceptives invalid as violation of constitutional right to privacy).

277. 342 U.S. 165 (1952) (petitioner's stomach pumped without his consent by state officers).

278. *Id.* at 172-73.

279. *See, e.g.*, Rhodes v. Robinson, 612 F.2d 766, 771-72 (3d Cir. 1979) (emotional harm caused by beating of another prisoner); Arroyo v. Schaefer, 548 F.2d 47 (2d Cir. 1977) (prisoner's right to be free from infliction of harm).

280. 443 U.S. 137 (1979). For a discussion of *Baker*, see *supra* notes 77-83 and accompanying text.

expressly noted that a constitutional violation could be found where a person is detained indefinitely in the face of repeated protests of innocence.[281] Justice Blackmun, concurring, similarly opined that deliberate and repeated refusals of a sheriff to check the identity of a prisoner avowing his innocence would violate the due process clause under the *Rochin* "shocks the conscience" standard.[282]

The culpability of the defendant may also determine whether the procedural due process protections afforded by the fourteenth amendment have been satisfied. As previously discussed,[283] in *Parratt v. Taylor*,[284] the Supreme Court held that a postdeprivation hearing to redress a negligent deprivation of property by the state fulfills the due process requirement of the fourteenth amendment.[285] The Court's conclusion was founded on the impracticability of providing a meaningful predeprivation hearing where property is taken as a result of random and unauthorized negligent actions of state officials.[286] Justice Blackmun, in his concurring opinion, reasoned that while a state may not practically afford a hearing before negligent deprivations, the same may not be true where property is deprived by the intentional actions of state officials.[287] Therefore, a postdeprivation hearing might not supply the process commanded by the Constitution to remedy a deliberate deprivation of property.[288]

Where a section 1983 action is brought to redress violation of a constitutional right that is infringed only where the defendant acted negligently, recklessly or intentionally, both the allocation of the bur-

281. *Id.* at 144.

282. *Id.* at 148 (Blackmun, J., concurring).

283. *See supra* notes 84-92 and accompanying text.

284. 451 U.S. 527 (1981).

285. *See id.* at 543-44.

286. *Id.* at 540-41.

287. *Id.* at 545-46 (Blackmun, J., concurring).

288. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436-37 (1982) (postdeprivation hearing constitutionally inadequate to redress taking of property by established state procedure). It is debatable whether the state can, in fact, more practically afford a predeprivation hearing when one of its employees intentionally, rather than negligently, deviates from his duties. *Compare* Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982); Weiss v. Lehman, 676 F.2d 1320, 1323 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3508 (U.S. Jan. 11, 1983); Tarkowski v. Hoogasion, 532 F. Supp. 791 (N.D. Ill. 1982); Parker v. Rockefeller, 521 F. Supp. 1013 (N.D. W. Va. 1981) (postdeprivation hearing insufficient where deprivation was intentional) *with* Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd sub nom.* Kush v. Rutledge, 51 U.S.L.W. 4356 (U.S. Apr. 4, 1983) (No. 81-1675); Sheppard v. Moore, 514 F. Supp. 1372 (M.D.N.C. 1981) (postdeprivation hearing satisfies due process clause where unauthorized and unpredictable, albeit intentional, deprivations occurred because state had no meaningful opportunity to afford hearing before deprivation).

den of proving culpability and the qualified immunity are affected. While the plaintiff in a section 1983 action generally does not bear the burden of proving any culpability, he must prove the degree of culpability necessary to establish a specific constitutional violation.[289] Most courts have failed to realize, however, that if the plaintiff must prove culpability to show a deprivation of a constitutional right, then no qualified immunity should be available to the defendant. If the plaintiff establishes a constitutional violation by proving the defendant's negligence, the objective tier of the qualified immunity, which shields only reasonable conduct, could not be satisfied. Similarly, if the plaintiff proves the constitutional deprivation by persuading the trier of fact that the defendant acted intentionally or with deliberate disregard of the risk of harm, the defendant could not in turn establish either the objective or subjective elements of the qualified immunity.

This interrelationship between proof of a constitutional violation and the qualified immunity was recognized in *Fielder v. Bosshard*,[290] a section 1983 action alleging failure to provide proper medical care to a prisoner in violation of the eighth amendment. The court, holding that the trial judge did not err when he refused to expressly charge the jury on the qualified immunity defense, reasoned as follows:

> In the instant case . . . we see only a linguistic difference between the standards for the *prima facie* case based on cruel and unusual punishment and the immunity defense. In order to establish a *prima facie* § 1983 case of cruel and unusual punishment, a plaintiff must prove that the prison authorities acted with deliberate or callous indifference to his serious medical needs. . . . If the plaintiff establishes the requisite "indifference" and thus establishes liability, then he would also have established the official's "malicious intent" as defined in *Wood* [*v. Strickland*], thus negating with the same proof the existence of the qualified immunity.[291]

If the plaintiff meets his burden of proving culpability to establish a violation of the Constitution, he will at the same time disprove the qualified immunity. If the defendant is nevertheless permitted to assert the immunity defense, both parties would carry the burden of proving the same issue—the culpability of the defendant. This mu-

289. *See Baker*, 443 U.S. at 140 n.1.
290. 590 F.2d 105 (5th Cir. 1979).
291. *Id.* at 109-10 (citations omitted) (emphasis added).

tual allocation of the burden of proof suffers from the unnecessary and undesirable risk of confusion and error already discussed.[292] Consequently, whenever a section 1983 plaintiff is required to prove culpability in order to demonstrate a particular constitutional violation, the defendant should not be allowed to raise the qualified immunity defense.

III. THE STANDARD OF CULPABILITY IN *Bivens* ACTIONS

A. *Origin and Scope of the* Bivens *Action*

As noted earlier,[293] section 1983[294] does not provide relief for constitutional violations caused by persons acting under color of federal, as opposed to state, law. Congress has not enacted a counterpart to section 1983 that would create a remedy for unconstitutional conduct of federal officers.[295] However, victims of federal official misconduct are not left without redress; the United States Supreme Court has implied from the Constitution itself an action for damages for deprivations of constitutional rights under color of federal law.

The Supreme Court first recognized an implied constitutional

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292. *See supra* notes 250-53 and accompanying text.

293. *See supra* note 22 and accompanying text.

294. 42 U.S.C. § 1983 (Supp. IV 1980).

295. The Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976), provides a cause of action against the United States for damages

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Prior to 1974, all claims arising out of assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process were excluded from the Act. 28 U.S.C. § 2680(h) (1970) (amended 1974). However, in 1974, § 2680(h) was amended to permit such claims with regard to acts or omissions of federal investigative or law enforcement officers. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (1976)).

The Federal Tort Claims Act, as amended, does not provide a cause of action for all constitutional violations. Although federal constitutional law is supreme in the state courts, Testa v. Katt, 330 U.S. 386, 391 (1947); U.S. CONST. art. VI, several lower federal courts have held that constitutional violations are not part of the "law of the place" giving rise to liability under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976). *See, e.g.*, Brown v. United States, 653 F.2d 196, 201 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1970 (1982); Birnbaum v. United States, 588 F.2d 319, 327 (2d Cir. 1978) (pre-1974 amendment). *But see* Norton v. United States, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978).

Three bills have been introduced in Congress that would amend the Federal Tort Claims Act to provide an exclusive remedy for all claims arising out of constitutional violations caused by federal employees. S. 1775, 97th Cong., 1st Sess. (1981); H.R. 24, 97th Cong., 1st Sess. (1981); H.R. 1696, 97th Cong., 1st Sess. (1981). *See* Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. ON LEGIS. 1 (1979).

cause of action in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[296] a case arising out of facts strikingly similar to *Monroe v. Pape*.[297] Plaintiff Bivens averred that agents of the Federal Bureau of Narcotics entered his apartment without a warrant, manacled him in front of his wife and children, threatened to arrest the entire family, searched the apartment, and arrested him for alleged narcotics violations.[298] Bivens brought an action for damages in federal court against the agents, complaining that the search and arrest violated the fourth amendment to the United States Constitution. The district court dismissed Bivens' suit for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.[299] The dismissal was affirmed on appeal.[300] The Supreme Court reversed.[301] Rejecting the defendants' contention that Bivens' only remedy was to pursue a tort claim in state court,[302] the Court noted that the fourth amendment confers rights independent of those protected by state tort law.[303] Even though no statute authorizes suit against federal officials who violate the Constitution, the Court held that the injured party may enforce his fourth amendment rights through a private cause of action in federal court.[304]

Having found that a cause of action may be implied from the fourth amendment, the Court next addressed the issue of what relief is available.[305] Although the terms of the fourth amendment do not expressly provide for damages,[306] the Court, exercising its inherent remedial power, approved a damage remedy to enforce the amend-

296. 403 U.S. 388 (1971).

297. 365 U.S. 167 (1961). *See supra* notes 61-64 and accompanying text.

298. *Bivens*, 403 U.S. at 389.

299. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12 (E.D.N.Y. 1967).

300. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 409 F.2d 718 (2d Cir. 1969).

301. 403 U.S. at 390, 398.

302. *Id.* at 390-91. The defendant asserted that the guarantees of the Constitution would be vindicated in the state tort action because the defense that the agent's conduct was a valid exercise of federal power would be unavailable if the agents' actions were unconstitutional. *Id.*

303. *See id.* at 390-94.

304. *See id.* at 395.

305. *See id.* at 395-97.

306. *See* U.S. CONST. amend. IV (no mention of damage remedy for violation). The only provision of the Constitution expressly prescribing a damage remedy is the just compensation clause of the fifth amendment: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

ment.[307] The Court reasoned that " 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' "[308]

Although *Bivens* only recognized a cause of action for fourth amendment violations,[309] the Supreme Court has subsequently authorized private damage actions against federal officials to redress infringement of other constitutional provisions.[310] In *Davis v. Passman*,[311] the Court implied a private cause of action for damages against a United States congressman who allegedly fired his deputy administrative assistant because she was a woman, in violation of the equal protection component of the due process clause of the fifth amendment. In *Carlson v. Green*,[312] the Court approved a *Bivens* action for deprivation of rights secured by the eighth amendment arising out of deliberate indifference to a prisoner's serious medical needs.[313] In fact, the *Carlson* Court did not even question whether *Bivens* extended to the eighth amendment and appeared to broadly interpret *Bivens* as establishing that a cause of action for damages could be implied in favor of the victim of any constitutional violation.[314]

Although a *Bivens* action apparently is not restricted to particular constitutional amendments, the Supreme Court has specified two situations where the constitutional cause of action is unavailable. "The first is when defendants demonstrate 'special factors counsel-

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307. *See Bivens*, 403 U.S. at 397.

308. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)) (footnote omitted). Justices Black and Blackmun and Chief Justice Burger dissented, each insisting that judicial creation of a damages remedy was actually legislation, which could appropriately be enacted only by Congress. *See id.* at 411-12 (Burger, C.J., dissenting); *id.* at 427-28 (Black, J., dissenting); *id.* at 430 (Blackmun, J., dissenting).

309. Butz v. Economou, 438 U.S. 478, 486 n.8 (1978).

310. *See generally* Student Project, *Constitutional Torts Ten Years After* Bivens, 9 HOFSTRA L. REV. 943 (1981).

311. 442 U.S. 228 (1979).

312. 446 U.S. 14 (1980).

313. *See id.* at 16, 17-18.

314. "*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court. . . . " *Id.* at 18. In Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701 n.27 (1982), and Harlow v. Fitzgerald, 102 S. Ct. 2727, 2732 n.10 (1982), the Court assumed, without deciding, that an action could be implied for violation of rights protected by the first amendment. Lower federal court decisions concerning the extent to which the *Bivens* cause of action applies beyond the fourth amendment are compiled at Annot., 64 L.Ed.2d 872 (1980).

ling hesitation in the absence of affirmative action by Congress.' "[315] The Court, in dicta, has suggested various special factors that may bar a private damage action for constitutional violations. A cause of action may not be implied where questions of federal fiscal policy are implicated[316] or where there is " 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department.' "[317] The Court has also posited that certain government officials might "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate."[318]

Lower federal courts have found other factors to bar an implied constitutional cause of action. In *Bush v. Lucas*,[319] the Fifth Circuit held that the "unique relationship between the Federal Government and its civil service employees" is a special factor that requires dismissal of a *Bivens* action seeking damages for demotion of a federal aerospace engineer allegedly in retaliation for his exercise of first amendment rights.[320] Similarly, a *Bivens* action brought by a soldier who was ordered to observe the explosion of a nuclear device without protection against radiation was dismissed because "the deleterious effects of service related suits on military performance," together with the availability of free medical care and limited compensation under the Veterans' Benefits Act,[321] were special factors counseling hesitation.[322]

While the foregoing special factors may bar a *Bivens* action where Congress has not acted, the Supreme Court also declared that

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315. *Carlson*, 446 U.S. at 18 (quoting *Bivens*, 403 U.S. at 396).

316. *See Bivens*, 403 U.S. at 396.

317. Davis v. Passman, 442 U.S. 228, 242 (1979) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

318. *Carlson*, 446 U.S. at 19; *see* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2701-02 (1982) (President of United States "occupies a unique position in the constitutional scheme" and, therefore, is absolutely immune from liability in *Bivens* actions).

319. 647 F.2d 573 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 3481 (1982).

320. *Id.* at 576. The Fifth Circuit also held that because of the government's special relationship with its employees, civil service remedies foreclose a *Bivens* action without regard to whether Congress intended these remedies to be an equally effective substitute for the *Bivens* remedy. *Id.; accord* Purtill v. Harris, 658 F.2d 134 (3d Cir. 1981); Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980).

321. 38 U.S.C. §§ 301-788 (1976).

322. Jaffee v. United States, 663 F.2d 1226, 1235-36 (3d Cir. 1981), *cert. denied*, 102 S. Ct. 2234 (1982); *see also* Lombard v. United States, 690 F.2d 215, 227 (D.C. Cir. 1982). The Supreme Court has granted certiorari to determine whether servicemen may sue superior officers for constitutional violations incident to military service. Wallace v. Chappell, 661 F.2d 729 (9th Cir. 1981), *cert. granted*, 103 S. Ct. 292 (1982).

the *Bivens* remedy will be unavailable "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[323] In *Carlson*, prison officials alleged that a *Bivens* action for damages for violation of a prisoner's eighth amendment rights was precluded because the 1974 amendment to the Federal Tort Claims Act[324] afforded a remedy for injuries caused by the officials' alleged failure to properly furnish medical care.[325] The Court rejected the defendants' argument, holding that Congress neither intended to preempt *Bivens* nor create an equally effective alternative when it amended the Act.[326] Although the Supreme Court has never held the *Bivens* remedy supplanted by an act of Congress,[327] lower federal courts have dismissed *Bivens* actions where they have found that Congress provided an alternative remedy.[328]

1. *Individual Liability under* Bivens.—*Bivens* and its progeny hold federal officials personally liable for damages when they violate the commands of the Constitution. Individual state actors, however,

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323. *Carlson*, 446 U.S. at 18-19. The Court acknowledged that Congress need not recite any "magic words" expressing its intent that the alternative remedy be a substitute for a *Bivens* action. *Id.* at 19 n.5. Furthermore, the remedy is to be equally effective in the view of Congress, not the courts. *Id.* at 19. Justice Powell, concurring in the judgment, and Chief Justice Burger, dissenting, implied that Congress could preclude the *Bivens* remedy by simply creating "adequate" alternative remedies. *Id.* at 27 (Powell, J., concurring); *id.* at 30 (Burger, C.J., dissenting).

324. *See supra* note 295.

325. *See* 446 U.S. at 19.

326. *Id.* The Court held the Federal Tort Claims Act to be less effective than the *Bivens* remedy because, among other things, recovery under the Act is available only against the United States and, thus, is a less effective deterrent than the *Bivens* remedy, which runs against the individual federal official; punitive damages are not afforded under the Act, 28 U.S.C. § 2674 (1976); the plaintiff cannot obtain a jury trial, *see* 28 U.S.C. § 2402 (1976); and a Federal Tort Claims action exists only if the state in which the constitutional violation occurs recognizes a cause of action for the misconduct, *see* 28 U.S.C. § 1346(b) (1976). *Carlson*, 446 U.S. at 21-23. For a discussion of the Federal Tort Claims Act, see *supra* note 295.

327. *But see* Brown v. General Servs. Admin., 425 U.S. 820 (1976) (§ 717 of Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. IV 1980), provides exclusive remedy for racial discrimination in federal employment). The *Brown* Court, however, did not specifically address the circumstances under which Congress may preempt the *Bivens* remedy.

328. *See, e.g.*, Purtill v. Harris, 658 F.2d 134 (3d Cir. 1981) (§ 15 of Age Discrimination in Employment Act, 29 U.S.C. § 633(a) (1976 & Supp. IV 1980), bars *Bivens* action for age discrimination); Gissen v. Tackman, 537 F.2d 784 (3d Cir. 1976) (§ 717 of Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976 & Supp. IV 1980), bars *Bivens* action for racial discrimination in federal employment); McKenzie v. Calloway, 456 F. Supp. 590 (E.D. Mich. 1978), *aff'd*, 625 F.2d 754 (6th Cir. 1980) (Administrative Procedure Act, 5 U.S.C. § 706 (Supp. IV 1980), bars *Bivens* action alleging reverse discrimination in employment).

cannot be sued under *Bivens* because redress for their constitutional violations is available under section 1983.[329] The implied constitutional cause of action has not yet been utilized to hold private actors liable. This is not to say, however, that, such an action would fail in all circumstances. While the Constitution generally guarantees rights against government interference, certain rights have been held to be protected against private incursion as well.[330] Violation of the latter constitutional rights by a private individual should be redressable through a *Bivens* action, absent special factors counseling hesitation or provision of an equally effective remedy by Congress.[331]

2. *Entity Liability under* Bivens.—The Supreme Court has never considered whether the government itself may be held liable for damages in a *Bivens* action. Although government entities are plainly subject to the constraints of the Constitution, lower federal courts have consistently rejected attempts to sue the government directly for damages under *Bivens*. *Bivens* actions against the federal government have been defeated by the doctrine of sovereign immunity.[332] States have also been held immune from liability for dam-

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329. Ward v. Caulk, 650 F.2d 1144, 1148 (9th Cir. 1981).

330. The thirteenth amendment's prohibition of slavery extends to private actors. *See* U.S. CONST. amend. XIII; The Civil Rights Cases, 109 U.S. 3, 20 (1883). Similarly, the constitutional right to freedom of interstate travel has been held to be secure against private interference. *See* United States v. Guest, 383 U.S. 745, 759-60 n.17 (1966); *see also* United States v. Classic, 313 U.S. 299, 315 (1941) (right to be free from private interference in federal primary election); *In re* Quarles, 158 U.S. 532, 535-36 (1895) (right to inform federal officials of violations of federal law); *Ex Parte* Yarbrough, 110 U.S. 651, 666 (1884) (right to be free from private interference in federal elections); United States v. Cruikshank, 92 U.S. 542, 552 (1875) (right to assemble to petition Congress for redress of grievances).

331. *See supra* notes 293-328 and accompanying text. By analogy to § 1983, a private individual also should be suable under *Bivens* where he conspires with federal officials to violate constitutional rights. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (private person acts under color of law and, thus, may be sued under § 1983 where he is involved in conspiracy with state officials).

332. Duarte v. United States, 532 F.2d 850, 852 (2d Cir. 1976); *see* United States v. Testan, 424 U.S. 392, 401-02 (1976) ("Where the United States is the defendant . . . the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does not create a cause of action for money damages unless . . . that basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' ") (citation omitted). Prior to *Bivens*, the Supreme Court did allow a cause of action against the United States for just compensation under the fifth amendment. Jacobs v. United States, 290 U.S. 13, 16 (1933).

Although the doctrine of sovereign immunity has been held to bar damage actions against the federal government, the federal government may be effectively enjoined from violating the Constitution through an action against a federal officer in his official, rather than individual, capacity. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 690-91 (1949). It

ages under *Bivens* by virtue of the eleventh amendment.[333] Prior to the Supreme Court's decision in *Monell v. Department of Social Services*,[334] which for the first time held municipalities accountable under section 1983, some courts did recognize an implied action for damages against municipalities for fourteenth amendment violations.[335] After *Monell*, however, *Bivens* actions against municipalities have uniformly failed on the ground that section 1983 is an equally effective alternative that preempts the *Bivens* remedy.[336]

B. *The Standard of Fault in* Bivens *Actions*

The Supreme Court's *Bivens*[337] decision simply recognized the

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may be persuasively argued that the defense of sovereign immunity also should be unavailable in damage actions alleging that the federal government has violated the Constitution. The underlying rationale of the doctrine—that "there can be no legal right as against the authority that makes the law on which the right depends," Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)—fails in constitutional cases, for constitutional rights were not created by the government, but instead regulate the government. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1557 (1972). Furthermore, the doctrine is an anomaly in our system of constitutional government. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 21-22, 163 N.E.2d 89, 94 (1959) ("[I]n preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based."). "[N]early every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go." K. DAVIS, ADMINISTRATIVE LAW TEXT § 25.01, at 451 (1959) (footnote omitted.). Even the Supreme Court has acknowledged that the doctrine is least justifiable in actions for money damages:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703-04 (1949) (footnote omitted). Finally, absent recovery against the federal government, the victim of a constitutional violation by a federal official is likely to be remediless. Congress has acknowledged that because federal officers are usually judgment proof, a *Bivens* action against individual officials is "a rather hollow remedy." S. REP. No. 588, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2789, 2790.

333. Garrett v. Illinois, 612 F.2d 1038, 1040 (7th Cir. 1980), *cert. denied*, 449 U.S. 821 (1981). *But cf.* Spicer v. Hilton, 618 F.2d 232 (3d Cir. 1980) (action for prospective relief).

334. 436 U.S. 658 (1978).

335. *Compare* Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); Hanna v. Drobnick, 514 F.2d 393 (6th Cir. 1975); Roane v. Callisburg Indep. School Dist., 511 F.2d 633 (5th Cir. 1975) (each recognizing implied cause of action against local government entities under fourteenth amendment) *with* Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977); Pitrone v. Mercandante, 420 F. Supp. 1384 (E.D. Pa 1976); Perzanowski v. Salvo, 369 F. Supp. 223 (D. Conn. 1974) (refusing to imply such cause of action).

336. Jones v. City of Philadelphia, 481 F. Supp. 1053, 1056 (E.D. Pa. 1979).

337. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388

existence of an implied damages action against federal officials to redress constitutional violations. Because Bivens' complaint was dismissed for failure to state a claim upon which relief could be granted, the Court had no cause to detail the contours of the action it had just countenanced. Questions such as the applicable statute of limitations, whether *Bivens* actions abate upon the death of the victim of the unconstitutional conduct, what immunities from liability pertain to *Bivens* actions, whether punitive damages are recoverable and the standard of culpability were left for future decisions. Some of these issues have been resolved by the Supreme Court;[338] others, including the question of the applicable standard of care, have not yet reached the Court. As in suits under section 1983,[339] to properly determine the standard of culpability in *Bivens* actions, one must analyze the plaintiff's prima facie case, the qualified immunity defense, and the Constitution, each of which may introduce a fault requirement.

1. *The Elements of the Plaintiff's Prima Facie Case.*—Nowhere in the "legislative history" of *Bivens* actions—the various Supreme Court cases construing the implied constitutional cause of action—is it suggested that in order to prevail, the plaintiff must establish not only that a federal officer deprived him of constitutional rights, but must further prove that the defendant acted negligently, recklessly or intentionally. Indeed, the Court implicitly negated any supplemental culpability requirement in its *Bivens* opinion when it defined the cause of action: "[T]he federal question [violation of a constitutional right] becomes not merely a possible defense to the state law action, but an independent claim *both necessary and sufficient* to make out the plaintiff's cause of action."[340]

The addition of a culpability element to the plaintiff's prima facie case would also run afoul of the Supreme Court's instruction that standards governing the liability of state officials under section 1983 should apply as well to federal defendants in *Bivens* actions.[341] Section 1983 law concerning immunities,[342] damages[343] and statutes of

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(1971).

338. *See* Carlson v. Green, 446 U.S. 14, 23-25 (1980) (*Bivens* actions survive death of victim); Butz v. Economou, 438 U.S. 478 (1978) (immunities under *Bivens*). *See infra* notes 348-85 and accompanying text.

339. 42 U.S.C. § 1983 (Supp. IV 1980).

340. 403 U.S. at 395 (emphasis added).

341. Butz v. Economou, 438 U.S. 478, 500-01 (1978).

342. *See id.* at 508-17.

343. Ellis v. Blum, 643 F.2d 68, 83-84 (2d Cir. 1981); Paton v. LaPrade, 524 F.2d 862,

limitations[344] has been adopted for *Bivens* actions.[345] There is no cogent reason to hold federal officials to a lesser standard of care with respect to the strictures of the Constitution than that which state officials must observe. To do so, as the Supreme Court acknowledged in *Butz v. Economou*,[346] would "stand the constitutional design on its head."[347] Thus, as in actions under section 1983, the plaintiff in a *Bivens* action need only prove that he suffered a deprivation of constitutional rights under color of law to state a claim for relief.

2. *The Standard of Fault Imposed by the Qualified Immunity.*—The Supreme Court did not consider the immunity available to the federal narcotics officers in *Bivens*, but instead remanded the issue to the court of appeals.[348] On remand, the Second Circuit held that while federal police are not clothed with absolute immunity, the officers could avoid liability by alleging and proving that they acted in good faith and with a reasonable belief in the validity of their actions.[349] This defense, the court explained, was identical to the qualified immunity afforded state police officers in section 1983 actions.[350]

Six years later, the Supreme Court, in *Butz*, agreed with the result reached by the Second Circuit in *Bivens*.[351] In *Butz*, various officials of the United States Department of Agriculture were alleged to have unconstitutionally initiated an administrative proceeding to revoke the registration of Arthur N. Economou and Co., Inc. as a commodity futures commission merchant.[352] The Supreme Court rejected the claim that all defendants were absolutely immune

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871-72 (3d Cir. 1975); *see* Carlson v. Green, 446 U.S. 14, 22 (1980) (suggesting that rules governing availability of punitive damages under § 1983 apply in *Bivens* actions).

344. Beard v. Robinson, 563 F.2d 331, 338 (7th Cir. 1977), *cert. denied sub nom.* Mitchell v. Beard, 438 U.S. 907 (1978).

345. *But see* Carlson v. Green, 446 U.S. 14, 24 n.11 (1980) (question of whether *Bivens* actions survive death of person whose rights were violated not necessarily governed by rules applicable to § 1983 litigation).

346. 438 U.S. 478 (1978).

347. *Id.* at 504.

348. 403 U.S. at 397-98.

349. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339, 1341 (2d Cir. 1972).

350. *Id.* at 1347.

351. 438 U.S. at 486.

352. *See id.* at 481-83. The defendants included the Secretary and Assistant Secretary of Agriculture, the Chief Hearing Examiner, several officials of the Commodity Exchange Authority, the Department of Agriculture attorney who prosecuted the proceeding and numerous auditors who investigated or were witnesses against Arthur N. Economou & Co., Inc. *Id.* at 482.

from liability for damages. Rather, the Court found, federal official immunity from liability for unconstitutional conduct cannot be distinguished from the immunity accorded state officers under section 1983, unless Congress expressly creates a different immunity for federal officials:

> The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials . . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.[353]

As a general rule, the Court held, federal executive officers are protected by the same qualified immunity available in section 1983 actions against state executive officials.[354] Only those federal officials who demonstrate that their "special functions require a full exemption from liability" are absolutely immune in a *Bivens* action.[355] Looking to the scope of immunity afforded at common law, the Court extended absolute immunity to the defendants who performed functions analogous to those of a judge or prosecutor.[356]

The Court, in *Nixon v. Fitzgerald*,[357] recently considered the immunity available to the President of the United States in *Bivens* actions. *Nixon* arose out of the same action that gave rise to *Harlow v. Fitzgerald*.[358] The complaint averred that President Richard M. Nixon approved the dismissal of Fitzgerald from his position as management analyst with the Department of the Air Force with full knowledge that Fitzgerald was being discharged in retaliation for his testimony before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress.[359] Nixon filed a motion for summary judgment, claiming that he was absolutely immune from liability for presidential actions.[360] The dis-

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353. *Id.* at 500-01 (footnote omitted).

354. *Id.* at 507.

355. *Id.* at 508.

356. *See id.* at 508-17.

357. 102 S. Ct. 2690 (1982).

358. 102 S. Ct. 2727 (1982); *see supra* notes 154-66 and accompanying text.

359. *See Nixon*, 102 S. Ct. at 2693-95. Fitzgerald sued Nixon under *Bivens* for violation of his first amendment rights and sought to imply a damage action under 5 U.S.C. § 7211 (Supp. III 1979) and 18 U.S.C. § 1505 (1976). 102 S. Ct. at 2697 n.20.

360. 102 S. Ct. at 2697.

trict court denied the motion[361] and Nixon's collateral appeal was summarily dismissed.[362] The Supreme Court granted certiorari to determine the scope of immunity accorded the President of the United States.[363]

Unlike its analysis in *Butz*,[364] the Court, in *Nixon*, could not ascertain the immunity by analogizing to the common law because the presidency did not exist through most of the evolution of the common law. Instead, the Court examined "our constitutional heritage and structure," which the Court believed to mirror the public policy concerns underlying the immunity issue.[365] The Court found that the responsibilities and discretion assigned the President give him a "unique position in the constitutional scheme" that distinguishes the President from other executive officials who are only entitled to a qualified immunity.[366] The President is more likely to be sued for his official acts than any other executive officer, the Court reasoned, because of the widespread impact and sensitive nature of his decisions as well as the prominence of his office.[367] Thus, the Court concluded, absolute immunity is necessary to ensure that the spectre of litigation does not deter the President from the vigorous exercise of his responsibilities.[368]

The Court further submitted that traditional notions of separation of powers mandate absolute presidential immunity.[369] The Court did acknowledge that courts may exercise jurisdiction over the President where necessary to maintain a proper balance of separation of powers or to further the public interest.[370] However, the Court held, a private suit for damages that alleges that the President violated the Constitution does not implicate either concern sufficiently to warrant

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361. *Id.*

362. *Id.*

363. Nixon v. Fitzgerald, 452 U.S. 959 (1981).

364. *See supra* notes 351-56 and accompanying text.

365. *Nixon*, 102 S. Ct. at 2701. The Court properly observed that unlike congressional immunity, which is provided in the speech and debate clause, *see* U.S. CONST. art. I, § 6, cl. 1, there is no textual basis for presidential immunity in the Constitution. The Court, however, found the weight of the historical evidence of the Framers' intent to justify absolute immunity for the President. 102 S. Ct. at 2702-03 n.31. Justice White, in a dissenting opinion joined by Justices Brennan, Marshall and Blackmun, argued that no support for absolute presidential immunity from civil liability could be gleaned from the text or the history of the Constitution. *See id.* at 2710-12 (White, J., dissenting).

366. *Id.* at 2702.

367. *Id.* at 2703.

368. *See id.* at 2705.

369. *Id.* at 2704.

370. *Id.*

judicial intervention.[371]

The Court next proceeded to define the scope of absolute presidential immunity. Citing the multitude of tasks that the President performs and the difficulty in isolating the specific functions that are involved in any given action, the Court declined to follow its general practice of limiting absolute immunity to particular functions of an office.[372] Because of the special nature of the presidency, the Court held, absolute immunity must be accorded for all acts "within the 'outer perimeter' of [the President's] official responsibility."[373] While this blanket immunity insulates the President from personal liability for unconstitutional actions, the Court expressed confidence that the threat of impeachment, scrutiny by Congress and the press, and concern with re-election, prestige and the historic stature of the office, will ensure that the President abides by the constraints of the Constitution.[374]

In the companion case, *Harlow*, the Court held that aides who execute authority delegated by the President are not shielded by the President's absolute immunity.[375] The Court noted that were it to hold otherwise, members of the Cabinet, whom the Court had previously determined to possess only qualified immunity,[376] could also claim derivative absolute immunity.[377] Furthermore, affording a blanket absolute immunity to presidential aides would run afoul of the Court's usual approach of limiting immunity to specific functions of an office.[378]

The Court also determined that presidential aides do not generally perform special functions entitling them to absolute immunity.[379] The Court did acknowledge that absolute immunity might be justified when aides, acting as alter egos of the President, exercise

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371. *Id.* The Court expressly limited its holding to judicially implied causes of action and did not address whether Congress has the power to create a damages action against the President. *Id.* at 2701 n.27. Both Chief Justice Burger's concurring opinion and the dissenting opinion, however, observed that because the Court held the President's immunity to be founded in the Constitution and mandated by separation of powers, Congress could not constitutionally abrogate the immunity. *Id.* at 2709 n.7 (Burger, C.J., concurring); *id.* at 2724 n.37 (White, J., dissenting).

372. *See id.* at 2705.

373. *Id.*

374. *Id.* at 2706.

375. 102 S. Ct. at 2734.

376. *See supra* note 354 and accompanying text.

377. 102 S. Ct. at 2734.

378. *See id.* at 2735. Chief Justice Burger argued in dissent that senior presidential aides are entitled to derivative absolute immunity. *See id.* at 2744 (Burger, C.J., dissenting).

379. *Id.* at 2736.

discretion in matters of national security and foreign policy.[380] As a general rule, however, the Court held that presidential aides may only assert the qualified immunity that governs most officers of the executive branch.[381]

As previously discussed,[382] although the Court in *Harlow* refused to generally extend absolute immunity to presidential aides, it did modify the elements of the qualified immunity applicable to federal officials. In *Butz*, the Court had resolved that federal officers asserting the immunity defense in *Bivens* actions must meet the standards of objective and subjective good faith that govern the immunity of state officials under section 1983.[383] In *Harlow*, however, the Court eliminated the subjective tier of the immunity defense in order to facilitate the disposition of frivolous claims prior to trial.[384] Therefore, regardless of his actual intent, a defendant in a *Bivens* action may avail himself of the qualified immunity if he did not know and could not reasonably have been expected to know that his conduct violated the Constitution.[385] The debate over whether this objective test imposes a negligence standard of liability or addresses only the state of the law has been thoroughly addressed in the discussion of section 1983.[386]

The availability of a qualified immunity defense in *Bivens* actions is further evidence that a plaintiff must prove only a constitutional violation under color of law to prevail. The immunity defense allows a federal official to avoid liability by proving the objective reasonableness of his conduct[387] and, thus, presumes that the plain-

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380. *Id.* at 2735. The Court held that on the record before it, Harlow and Butterfield had failed to meet their burden of proving that the responsibilities of their office required absolute immunity and that they were executing the protected functions when they participated in the decision to discharge Fitzgerald. *Id.* at 2736. The Court, however, did not rule out the possibility that this standard could be satisfied on remand. *Id.*

381. *Id.* at 2734.

382. *See supra* notes 154-66 and accompanying text.

383. *See* 438 U.S. at 506-07.

384. *See* 102 S. Ct. at 2737-39.

385. It is unclear whether *Harlow* applies to actions under § 1983. *See supra* notes 167-75 and accompanying text.

386. *See supra* notes 183-202 and accompanying text.

387. While the Supreme Court has never addressed the allocation of the burden of pleading and proving the qualified immunity in a *Bivens* action, it has held that the defendant bears the burden of proving entitlement to absolute immunity. *See Harlow*, 102 S. Ct. at 2735-36; *Butz*, 438 U.S. at 506. Furthermore, under the Court's reasoning in *Butz*, no basis exists for differentiating between federal and state officials for purposes of assigning the burden of proving and pleading the qualified immunity. Thus, as in actions under § 1983, the government official should bear this burden. Most courts, including the court of appeals on

tiff is not required to establish the defendant's negligence to prevail. As was discussed in the context of section 1983 actions, assigning both parties the burden of proof with respect to the reasonableness of an official's actions invites an unnecessary and unwanted possibility of juror confusion and error.[388] This risk exists regardless of whether the immunity is read to apply a pure negligence standard to the official's actions or is interpreted as solely concerning a reasonable official's knowledge of the law.[389]

The fact that a federal defendant no longer must prove his subjective good faith to avail himself of the immunity does not affect this analysis. It is well settled that the plaintiff in a section 1983 action is not required to prove that the state actor intended to violate his constitutional rights.[390] Under the rule announced in *Butz*, the plaintiff in a *Bivens* action similarly need not prove such intent.[391] Thus, the Court did not shift the burden of proving wrongful intent to the plaintiff when it abrogated the subjective tier of the qualified immunity; it simply adopted a purely objective standard of culpability for *Bivens* actions.

3. *The Standard of Culpability Imposed by the Constitution.*—Although examination of the elements of the plaintiff's prima facie case and the qualified immunity reveals that the plaintiff in a *Bivens* action is not generally required to prove the defendant's negligence, recklessness or intent, the plaintiff will have to prove any culpability necessary to establish the specific alleged violation of the Constitution. The rights specified in the first eight amendments to the Constitution, although only protected against incursion by the federal government,[392] have largely been incorporated into the fourteenth amendment through a series of judicial decisions and, thus, are guaranteed against the states.[393] Consequently, the interpretation

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remand in *Bivens*, have required the defendant to plead and prove the qualified immunity. *E.g.*, Halperin v. Kissinger, 606 F.2d 1192, 1208 (D.C. Cir. 1979), *aff'd*, 452 U.S. 713 (1981); Beard v. Mitchell, 604 F.2d 485, 495-96 (7th Cir. 1979); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 712 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); Jones v. United States, 536 F.2d 269, 272 (8th Cir. 1976); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

388. *See supra* note 250 and accompanying text.

389. *See supra* notes 251-53 and accompanying text.

390. *See supra* notes 61-64 and accompanying text.

391. *See* 438 U.S. at 506-07.

392. Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

393. FIRST AMENDMENT: Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972) (establishment and free exercise clauses); Gitlow v. New York, 268 U.S. 652 (1925) (guarantees of freedom of speech

of these rights, including the degree of fault, if any, that a plaintiff must prove to establish a violation of the constitutional norm, will be the same for complaints against federal officials under *Bivens* as for suits arising out of unconstitutional state action brought under section 1983.

Where a violation of the Constitution does not turn on the intent or reasonableness of the government official's conduct,[394] the requirement that the plaintiff prove a deprivation of constitutional rights affects neither the standard of fault nor the burden of proving or disproving culpability in *Bivens* actions. However, when the plaintiff must prove culpability to establish a particular constitutional violation,[395] the defendant should not be permitted to assert the qualified immunity defense. If the plaintiff, in demonstrating an infringement of his rights, satisfies his burden of proving negligence, then the defendant could not in turn prove the objective reasonableness of his conduct. Similarly, by demonstrating that the defendant contravened the Constitution by acting recklessly or with wrongful intent, the plaintiff will, with the same evidence, negate the immunity. Therefore, just as in actions under section 1983, the qualified immunity defense should be unavailable in *Bivens* actions whenever the plaintiff must prove culpability to establish a constitutional violation.

IV. CONCLUSION

No single standard of culpability governs all section 1983[396] and *Bivens*[397] actions. The standard of fault will vary depending upon whether the qualified immunity defense is available and asserted, and whether the plaintiff must prove any culpability to establish the alleged constitutional violation. Therefore, the court must identify

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and press). FOURTH AMENDMENT: Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule); Wolf v. Colorado, 338 U.S. 25 (1949). FIFTH AMENDMENT: Benton v. Maryland, 395 U.S. 784 (1969) (guarantee against double jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination). SIXTH AMENDMENT: Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront opposing witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); *In re* Oliver, 333 U.S. 257 (1948) (right to public trial). EIGHTH AMENDMENT: Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (guarantee against cruel and unusual punishment).

394. *See supra* notes 258-60 and accompanying text.

395. *See supra* notes 263-88 and accompanying text.

396. 42 U.S.C. § 1983 (Supp. IV 1980).

397. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

which sources of a fault requirement are present in each case in order to ascertain the applicable standard of care, as well as to determine which party bears the burden of proving or disproving culpability.

The interrelationship of the sources of a culpability requirement proposed by this article holds the government and its officials to an appropriate standard of care with respect to the strictures of the Constitution. In cases where the qualified immunity is unavailable—principally section 1983 and *Bivens* actions for injunctive relief and suits against municipalities under section 1983—strict liability is properly imposed for violations of constitutional rights. Assuming that the plaintiff proves a deprivation of rights and satisfies the general requisites for equitable relief,[398] there is no reason to demand further proof of culpability before enjoining continued invasions of constitutional rights. Similarly, municipalities should be held strictly liable for deprivations of constitutional rights that are inflicted pursuant to municipal policy or custom. As the Supreme Court observed in *Owen v. City of Independence*,[399] the risk of loss flowing from breaches of the Constitution should be borne by the government entity rather than the victim, particularly since the individual government official who caused the injury is likely to be immune or judgment proof.[400] The Court also conceded that the deterrent function of section 1983 will be furthered by strict municipal liability, which will encourage systemwide reforms designed to protect constitutional rights.[401] Finally, as the Court concluded in *Owen*, the policy concerns that mandate that individual officials should not be held strictly liable are "less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue."[402]

Under the proposed standard, public officials who violate the Constitution will be held personally liable only if they acted unreasonably. The Supreme Court's immunity decisions have repeatedly acknowledged that a negligence standard strikes the proper balance between the need to compensate and deter deprivations of constitutional rights and the need to ensure that government officials are not unduly inhibited in carrying out the duties of their office nor unjustly

398. *See* City of Los Angeles v. Lyons, 51 U.S.L.W. 4424 (U.S. Apr. 20, 1983) (No. 81-1064); Ashcroft v. Mattis, 431 U.S. 171 (1977); Rizzo v. Goode, 423 U.S. 362 (1976).

399. 445 U.S. 622 (1980).

400. *See id.* at 651.

401. *Id.* at 651-52.

402. *Id.* at 643 (footnote omitted).

held responsible for mistakes made in good faith and without fault. It is not unfair to expect public officials to act reasonably, especially where constitutional rights are at stake. As Justice White pointed out in his dissenting opinion in *Nixon v. Fitzgerald*:[403] "The caution that comes from requiring reasonable choices in areas that may intrude on individuals' legally protected rights has never before counted as a cost"[404] that is unjustifiably imposed upon the government. Indeed, if government officials were not held liable when they acted negligently, common law rights would be afforded greater protection than the fundamental individual rights guaranteed by the Constitution.[405]

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403. 102 S. Ct. 2690, 2709 (White, J., dissenting).

404. *Id.* at 2726 (White, J., dissenting).

405. Two arguments have been raised in opposition to a negligence standard that are unrelated to the concern with the effect of the threat of personal liability upon public officials. First, it has been submitted that if liability is imposed for negligent invasions of constitutional rights, courts will not be able to distinguish between torts and constitutional violations. As a result, it is contended, § 1983 and *Bivens* actions will simply become fonts of state tort law. *See* Bonner v. Coughlin, 545 F.2d 565, 568 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978). However, as Judge Swygert pointed out in his dissenting opinion in *Bonner*, while rejecting § 1983 claims for negligence would

> prevent the inundation of the federal courts with state tort claims . . . [t]he same function would be served . . . by rejecting every section 1983 case brought by plaintiffs with last names beginning with letters that come after "K" in the alphabet. Mere efficiency is not enough to justify a dichotomy that screens out cases which are obviously within the ambit of the injuries for which Congress intended to provide a remedy in section 1983.

Id. at 572 (Swygert, J., dissenting). Furthermore, the Supreme Court has repeatedly held that tortious conduct does not rise to constitutional magnitude on grounds other than the degree of unreasonableness of the public official's conduct. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981); Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693 (1976).

A negligence standard has also been opposed because of the desire to avoid increasing an already overcrowded federal docket. Justice Harlan eloquently supplied the complete answer to this argument in his concurring opinion in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring):

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.